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THE ESTABLISHMENT OF THE CHURCH OF ENGLAND: ITS CONSTITUTIONAL AND LEGAL SIGNIFICANCE¹

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Among American churchmen and statesmen, there has been a tendency to regard the Establishment of the Anglican Church entirely in the light of a privilege conferred by the State on one church to the exclusion of others. Where the idea of the Establishment has been derived from the sight of the immunities and official endowment enjoyed by the church of the colonial governor, this point of view is natural. It determined the early statesmen of the young republic to dispense with a luxury which appeared to them to be pregnant with oppression and arrogance.² Externally there is little to criticize in the view for it represents fairly accurately the relative position of the Anglican Church both in colonial and English history in the eyes of non-Anglican communions. Internally, however, the case is not as simple, as the Free Churchman, whether within or without the Anglican fold, has been ready to detect, and Cartwright here is in complete accord with Newman. The conflict was brought to an issue when the House of Commons rejected the proposals for the revision of the Book of Common Prayer of 1662 in two consecutive years, 1927 and 1928.

Two years later on February 5th. 1930, a resolution was passed by the Church Assembly, reiterating the declaration of

¹ This article is an expansion of the paper read under this title at the joint session of the Society with the American Historical Association on Wednesday, December 29, 1937. The main addition is the long statement of the Hardwicke judgment (1738) which is accessible only to those who have a law library available. It is also a summary of three lectures given in the University of Western Ontario and Huron College, London, Canada, November 3-5, 1937. I desire to take this opportunity of expressing my thanks to my friend Dr. T. Ellis Lewis, Librarian of The Squire Law Library in the University of Cambridge, for the help he gave me in 1938 when I was working over the material.

² Cf. The Act of June 2, 1692 (Maryland) *ap.* P. G. Mode, *Source Book and Bibliographical Guide for American Church History* (Menasha, Wisconsin, 1921), 38f.: the opposition to the appointment of an Episcopate turned, to some extent, on the same point, v. Bishop Sherlock's report, *Ibid.*, 251-255, particularly 253f.; for Jefferson's opposition to the Establishment, v. R. J. Mott "Sources of Jefferson's Ecclesiastical Views," *Church History*, III (1934), 267-284.

the Archbishops and bishops of July 2nd, 1928, that whereas

"it is a fundamental principle that the Church, that is, the Bishops, together with the Clergy and Laity, must in the last resort, when its mind has been fully ascertained, retain its inalienable right, in loyalty to our Lord and Saviour Jesus Christ, to formulate its faith in Him and to arrange the expression of that Holy Faith in its form of worship. It is desirable that a Commission should be appointed to enquire into the present relations of Church and State, and particularly how far the principle, stated above, is able to receive effective application in present circumstances in the Church of England, and what legal and constitutional changes, if any, are needed in order to maintain or to secure its effective application; and that the Archbishops be requested to appoint a Commission for this purpose."³

Between the summoning of the Commission (announced on November 17th. 1930) and its final report, five years later, two events occurred to give additional force to its original instructions. The first was the outbreak of the strained relations between the churches of Germany and the new German State; the second was the election to the House of Commons of Mr. A. P. Herbert, whose avowed intention was to give legal effect to the proposals of the Royal Commission on Matrimonial Causes, which reported in 1912. In 1931 a joint committee of the Convocations of Canterbury and York had already been appointed to consider the bearing of Resolution 11 of the Lambeth Conference (1930) upon the practice of the Church in certain matters connected with holy matrimony. Its report was published in the same year (1935) as the Church Assembly's *Report on Church and State*, under the title, *The Church and Marriage*.⁴

The publication of *Church and State*, then, may be regarded as the ecclesiastical protest against the action of Parliament in rejecting the Prayer Book Measures of 1927 and 1928. Its appearance aroused a considerable body of protest at the time.⁵ Subsequent public utterances of high ecclesiastical authority have added point to the protests. The action of the King in Parliament in passing the Matrimonial Causes Act (1937),⁶ extending the grounds of valid divorce from 'the one cause' to others and permitting the re-marriage of the parties to the suit

³ *Church and State, Report of the Archbishops' Commission on the Relations between Church and State*, (Church Assembly 523) (Westminster, 1935), 1; hereinafter cited as *Church and State*, 1935.

⁴ (London, S. P. C. K., 1935); cited hereafter as *Church and Marriage*, 1935.

⁵ Cf. The Bishop of Norwich (B. Pollock), *Church and State* (London, 1936), 1ff. 59ff.

⁶ 1 Edw. 8. 1 Geo. 6. Ch. 57.

has raised, finally, an issue latent in English ecclesiastical history since the Act for the Submission of the Clergy (1532)—the issue of the relation of the canon law of the Church to the common and statute law of the Realm. The problem has been steadily shelved by the State though it has been intermittently raised by the Church. The question has at last been crystallized by two actions of Parliament within a decade and its significance has been coloured by the ecclesiastical developments of the continent of Europe. It would seem opportune, therefore, to review the historical evidence for the nature of the Establishment with a view to distinguishing between the lawful and recognized actions of the representative government in regard to the Church 'by law established,' and the Erastian control of the State over affairs ecclesiastical. Put briefly in the form of a question, Where does the State exceed the bounds of Hooker and enter the domain of Hobbes?

In approaching the problem, it is necessary to set aside the privileges appertaining to the Established Church:—the presence of its Archbishops and senior diocesan bishops in the House of Lords, the exclusive right to conduct the ceremonies of Coronation, the legal right to the monarch's adhesion to its communicant membership, together with a certain official status and social prestige, the loss of which was so keenly felt by the writer of the First Tract.⁷ These elements, though they may be of considerable value to the Church and its hierarchy, are of the nature of accidents and do not belong to the essence of the question under consideration.

The thesis set out in this paper is an attempt to answer the question from the angle of the constitutional historian: that the established order of the Church of England is but the ecclesiastical counterpart of the State of England, in which Church and State are but the spiritual and temporal aspects of the same body politic existing under the rule of an anointed king, (cf *Christos, Messiah*), who is both *Fidei Defensor* and *defensor libertatum regni*. The development of this situation starts from the principle put forward by Edward I from the Justinian Code, *quod omnes tangit ab omnibus approbetur*.⁷

⁷ "Hitherto you have been upheld by your birth, your education, your wealth, your connexions; should these secular advantages cease, on what must Christ's Ministers depend? Is not this a serious practical question? We know how miserable is the state of religious bodies not supported by the State. Look at the Dissenters on all sides of you, and you will see at once that their Ministers, depending simply upon the people, become the *creatures* of the people. Are you content that this should be your case?" J. H. Newman, *Tracts for the Times*, I.

In secular affairs the principle has been worked out along the lines of the phrase, "No taxation without representation," leading to the ultimate control of the purse strings of the State by the representatives of the nation in Parliament.⁸ In this respect it followed the lines of its initial proposal by the papacy on behalf of the clergy in Convocation. In spiritual affairs, it will be argued, a parallel development is discernible, and in matters ecclesiastical, constitutional development might be conveniently summed up in a parallel sentence, "No damnation without representation," not to exclude therefrom the element of financial control inherent in the constitutional phrase, whereby the final control of the power of the keys has been wrested from the exclusive possession of the clergy and placed in the hands of both the clergy and laity's representatives in Parliament.⁹ Put rather differently, in the mode of Dicey, the constitutional development, which led to the exclusion of the *droit administratif* in English civil polity, ultimately produced the same elimination from English ecclesiastical polity of canon law as an ecclesiastical *droit administratif*. Both, incidentally, are French developments.

An example taken from current controversy will serve to clarify the issue at stake and the conflict of jurisdiction involved. The opposition to the reform of the Divorce laws has come in the main from the rigid sacramentalist party to whom participation in the Eucharist is necessary to salvation. This party is most emphatic in its desires not only to close the churches to the re-marriage of either of the parties to a divorce suit, during the life time of the other party, (although the law of the Realm permits such marriages), on the ground that a marriage in these circumstances involves both parties in adultery—the rigid canonist position; but also to propose in Convocation and the Church Assembly that any person who during the lifetime of the other party contracts a marriage shall be repelled from the communion table. It is true that the extreme proposal was rejected, but its significance lies in the fact that it involves the application *de facto* of 'the lesser excommunication' to any who

8 W. Stubbs, *Select Charters* (9th ed.) 40. The reference is to Justinian *Cod.* V, Tit. 59, 5 c. 3. Its use by Edward I may have been suggested by a decretal of Innocent III, in which it is cited; and in England during the thirteenth century, its associations are almost invariably ecclesiastical. (M. V. Clarke, *Mediaeval Representation and Consent* [London, 1936], 264ff., for full references and discussion.)

9 F. Makower, *The Constitutional History of the Church of England* (London, 1895), 33ff., noticed this parallel and develops his argument along these lines.

accepts the legal relief provided by the law of the land.¹⁰ If the proponents of this course are correct in their view that excommunication here on earth, if it is not raised before death, involves damnation hereafter, then the person so repelled is, unless he renounces his rights as a subject, doomed to damnation, not because he is "an open and notorious evil liver" who has not "amended his former naughty life," but because he has chosen the law of the land and rejected the canon law. (It is true that the canonist might reply that by his re-marriage he had become "an open and notorious evil liver," but the reply really begs the question). Here, then, we have a case of "damnation without representation." Even the compromise proposed, viz., that each case should be submitted to the judgment of the bishop as ordinary constitutes a presumption of guilt, and is clearly unconstitutional if not illegal. In as much as the course of action has been permitted as lawful by the King in Parliament, the matter lies outside the legal cognizance of the judge of a spiritual court. If the bishop, as ordinary, proceeds to cite the party or parties before him and to refuse access to the Holy Communion to such a party or parties, he lays on him "the lesser excommunication" whether he uses the term or not. Blackstone pointed out the consequences:—

But if the judge of any spiritual court excommunicates a man for a cause of which he hath not legal cognizance, the party may have an action against him at common law, and he is also liable to be indicted at the suit of the King.¹¹

In an independent church, sect, or society the validity of their position might be admitted, but even in such a case there might ensue an action for defamation of character or an injunction to restrain the corporation from withholding the rights of membership. In the Established Church, the position is as untenable as an attempt by the Treasury to revive ship money or the benevolence on the ground that the crown had never freely consented to abandon them as the declaration of their illegality had been extorted by violence or threat of violence.

¹⁰ *v. The Times* (London, November 19-20, 1937); and *The Chicago Daily Tribune* (Nov. 19, 1937); and Professor (now Bishop) N. P. Williams' warning to extremists.

¹¹ Sir William Blackstone, *Commentaries on the Laws of England*, III. 101 f.; the parties would be entitled, legally, to refuse to submit to the Ordinary's citation (*v. Hardwicke's judgment, infra*). Access to Communion is protected by law. (*Jenkins v. Cook*, 45 L. J. P. C. 1; L. R. 1, P. D. 80) *v. J. M. Dale, The Clergyman's Legal Handbook*, 7th. ed. by J. S. Risley (London, 1898), 203; J. H. Blunt, *The Book of Church Law*, ed. Sir W. G. F. Phillimore Bt. and G. E. Jones (London, 1901), 103-104.

The problem, then, involves an examination of three aspects of the Establishment:—

First, the elements of the Establishment visible prior to the Reformation;

Secondly, the process whereby the Establishment was effected in the Reformation and the years which followed (1529-1662); and

Thirdly, the effects of the constitutional developments, of legislation and judicial interpretation subsequent to 1662 on the position of the Church and the nature of the Establishment.

In each phase, the issue will be found to lie in the resistance of the legislature, whether it be the King as law-giver or the representatives of the people, to the imposition of law or taxation in which it has had no share in the determination or assessment. It is primarily an historical question involving the main features of the development of the constitution. The parallel is most clearly seen in the Reformation Parliament of Henry VIII where the first blow aimed at the authority of the Church lies in the realm of taxation—excessive fees for mortuaries and probate, which are fixed for the future by the King in Parliament; then the jurisdiction of ecclesiastical courts and canon law, as courts and legislation which do not proceed from the King—whether the King in Council or the King in Parliament is immaterial at that point, as the King is the source of law and justice, the *fidelis legislator*.¹² The issue between the King in Council and the King in Parliament still remained to be settled, and in the process whereby the principle of legislative control was finally settled in favour of Parliament, the status of the Church changed in conformity with the changed status of the Crown. In saving the nation from legislation by royal proclamation—by the King in Council—under James I and Charles I, and the Church from the dispensing power of the King under Charles II and James II, the King's Courts and the King in Parliament succeeded to the power hitherto enjoyed by the

¹² J. R. Tanner, *Constitutional Documents of the Tudor Period* (Cambridge), 12, note. The English Reformation began "not with the enunciation of some new truth but with an attack on clerical fees." *Ib.* 13. "The policy of the Tudors which struck at the liberties of overmighty subjects was now directed against the immunities of an overmighty corporation." *Ibid.*, 14. Cf. A. F. Pollard, *Henry VIII* (London, 1931), 249-271, 282-288. For a discussion of the *fidelis legislator* v. A. Robertson, *Regnum Dei* (London, 1901), 313-323.

King in Council, and achieved complete control over legislation.¹³

I. It is not the writer's intention to try to prove that "the Church of England was Protestant before the Reformation and Catholic after," but rather to work out the consequences of Maitland's thesis that the English Church was willing to accept and enforce the whole of the canon law and that it was only prevented from achieving that object by the limitations imposed by the secular authorities—the State. It is in this attitude of the State towards its colleague—or other aspect—the Church, within the *Respublica Christiana* that the idea of the Establishment is to be found. It is not a statutory declaration or institution; it is a constitutional development and, apart from the Acts of Supremacy and Uniformity, its origin and existence must be sought in usage, precedent, and custom rather than in Acts of Parliament. Its parallel is to be found in the responsibility of the ministers of the crown to Parliament and the emergence of the Cabinet and Prime Minister, for the clergy are the ministers of the Crown *in rebus spiritualibus*. It is, then, in the relationship existing between the clergy and the crown that the origin of the Establishment will be found. Its consideration, therefore, involves an examination of the nature of English kingship.¹⁴

Before the Norman Conquest, English churchmanship, in common with all other Teutonic churchmanship, found its natural headship in the national king. The reason for this is to be found in the rôle of the king in Teutonic paganism.¹⁵ In

13 For a full statement of the legal and constitutional controversy raised by James I's alliance with Bancroft v. R. G. Usher, *The Reconstruction of the English Church* (New York, 1910), I, 334-402; II, 74-153, 206-245. Cf. J. H. Blunt, *The Reformation of the Church of England* (New York, 1882), II, 368-373, 598-603; and Hardwicke's judgment *infra*. For a convenient edition of the Canons, in both Latin and English, with introduction and notes, v. *Constitutions and Canons Ecclesiastical*, with notes by J. V. Bullard (London and Milwaukee, 1934).

14 For the *Respublica Christiana* and the organic unity of Church and State see O. Gierke, *Political Theories of the Middle Ages*, tr. F. W. Maitland, (Cambridge, 1913), viii-xii, xxx-xlv, 9-21, 30-37, etc.; J. N. Figgis, *Churches in the Modern State*, (London, 1913), Appendix I: *Respublica Christiana*.

15 H. M. Chadwick, *The Cult of Othin*, (Cambridge, 1899), 3-6, 26f. *et passim*; *The Origin of the English Nation*, (Cambridge, 1907), c. XI; *The Heroic Age*, (Cambridge, 1912), 337ff., 366-378, particularly, "We may note further that in the North there is no evidence of a specifically priestly class; temporal and spiritual power were apparently united in the same person. Among the Angli on the other hand there was such a class, though, in contrast with the Burgundians, the high-priest seems to have been subordinate to the king." (367). Reference may also be made to an article by P. Grierson, "Election and Inheritance in Early Germanic Kingship," *Cambridge Historical Journal*, VII (1941), pp. 1-22.

the cult of Othin, the king ceremonially offered himself as a sacrifice for the people. That ceremony was undoubtedly a commutation of an actual sacrifice. The king, then, was the high priest (and the sacrifice) to the pagan god, whose oracle he was in his life time. It is significant to notice in this respect that no Teutonic people was converted to Christianity before its king had accepted that faith, and, as in the case of Penda of Mercia, when the king reverted to paganism, his people followed him.¹⁶ The importance of this fact was recognized by the Papacy as, for instance, when Gregory the Great sent Saint Augustine to the court of King Ethelbert. It is equally important to notice that the king only ventured to take the step after an adequate revelation or demonstration of the superiority of the Christian God over Othin and the gods of his fathers. The most striking instance of this fact is the action of Clovis, King of the Franks, in the battle against the Alemanni in 496, as recorded by Gregory of Tours. The conversion can hardly have been a momentary affair, even with full regard to the exemplary piety and prayers of Saint Clotilda. Clovis must have been awaiting some opportunity in the form of a sign after which his *fideles* could not deny the validity of the change, and with it their allegiance.¹⁷ Outside the German world, the exploitation of the shining cross of Constantine is evidence of the same attitude of mind. The king remained, therefore, the religious head of his people, and when the Christian faith displaced the cult of Othin the religious traditions of pagan kingship persisted in the office of the Christian King. The royal bounty served only to emphasize the royal status as the source of blessings for the Church. In English kingship, with certain possible exceptions such as that of the feeble-minded Aethelwulf in his dotage, this position remained uncontested until the advent of Anselm and is not abandoned until Henry II's penance at Avranches.¹⁸ The reform of the Church under William the Conqueror was carried out according to the custom of his 'ancestors and predecessors, kings of England.'

16 W. Bright, *Chapters in Early English Church History*, 3rd ed., (Oxford, 1897), 145.

17 G. Kurth, *Clovis*, 2nd ed. (Paris, 1901), 318-321. J. B. Bury, *The Invasion of Europe by the Barbarians*, (London, 1928), 231-235, 239-247. I heard Bury give this reason for the conduct of Clovis in 1912. No reference of it however, appears in the manuscript from which Professor Hearnshaw printed this edition. There is nothing strange in this as Bury changed the course from year to year in order to include the more recent discussions of points.

18 Z. N. Brooke, *The English Church and the Papacy* (Cambridge, 1931), 215-217.

In this period, the higher clergy took their place along with the higher baronage of the realm in the various moots, courts and assemblies of the realm, so that the growth of the common law of the land was accompanied by the growth of a *ius commune ecclesiasticum*, which still forms the basis of English Church Law. In separating the courts ecclesiastical from the lay courts, William I dealt a blow to the ecclesiastical common law by preparing the way, probably unwittingly, for its supersession by the Canon Law which was in the process of development on the continent.¹⁹

There, the state of affairs which had lasted so long in England did not continue unchallenged. In the ninth century, while Hincmar of Rheims was maintaining the conservative position, others, notably the followers of the Forger of Le Mans, Pseudo-Isidore, were setting forth the theory of the supremacy of the spiritual in the Forged Decretals and other kindred documents. The theory on which they based their position was the claim that the humblest priest was superior to the mightiest emperor. His authority was enforced by the sentence of excommunication, and the clergy were protected by the definitions of what constituted a valid court, an impartial judge, and reliable witnesses. The need of an impartial judge, whose court could not be coerced by feudal violence, led naturally to the recognition of the Bishop of Rome.²⁰

The position was supported by Nicholas I, possibly under the influence of Anastasius Bibliothecarius, and led to the humiliation of Hincmar both in his and in his successors' pontificates.²¹ After the Synod of Sutri (1046) had rehabilitated the prestige of the German King, in the Emperor Henry III, and restored the decency of the papacy, there set in a period of royal control of the affairs of the Church, which outraged ecclesiastical opinion already moulded by the theory of the Forged Decretals.

19 *Cambridge Medieval History*, V, 516. I am indebted to Professor J. T. McNeill for calling my attention to the excellent paper by W. Lichtenstein, "The Date of Separation of Ecclesiastical and Lay Jurisdiction in England," *Illinois Law Review*, III, (1908-9), 347-353, in which he shows, I think conclusively, "that there is considerable doubt whether the two jurisdictions were separate before Stephen, but at the end of his reign the courts Christian tried criminal cases, and settled all civil cases in which the church was party. By the reign of Henry II, the two courts are sharply separated; their laws are different, and now that the secular law is wielded by the strong hand of the great king, both jurisdictions are prepared to struggle for every inch of ground."

20 For the analysis of the system of Pseudo-Isidore, P. Fournier, "Étude sur les Fausses Décrétales," *Rev. d'Hist. Eccl.*, VIII (1906), 38-51.

21 On the influence of Anastasius on Nicholas I: v. E. Perels, *Papst Nikolaus I und Anastasius Bibliothecarius* (Berlin, 1920), 271ff.; on Hincmar, *Ibid.*, 283ff.

The result was the revival of Pseudo-Isidorian doctrine as the programme of the reforming party, in particular of the Italian school, and its "reception" by the papacy may be set in 1059 with the accession of Nicholas II, seven years before the battle of Hastings. Henceforth the theory of the superiority of the "Church," down to the humblest priest over the secular ruler, even the Emperor, holds the field both in Papal policy and in Canon Law. Its apologists directed their attention to the process of secularizing the status of the laity, in particular of the Teutonic kings whose *persona mixta* they denied. The term *persona mixta* really reflects the dual personality of the king as both human and divine and its adaptation to the ecclesiastical view of priest and layman is a misapplication. The development was contested by an appeal to Saint Augustine, from whose works both sides drew arguments against their opponents. It is not the least of Carl Mirbt's services to Church History that he has collected the Augustinian passages from contemporary polemical literature.²²

The inoculation of the English Church with the new theory was initiated by Lanfranc, whose collection of "select passages" from the Bec manuscript of Pseudo-Isidore prepared the way for the more thorough going treatment of Anselm, Theobald, and Becket.²³ The separation of the courts spiritual from the courts temporal freed the administration of the church courts from the influence of common law and ancient custom. It was, however, the total substitution of continental clerics in the hierarchy for English prelates, save in the case of Wulfstan of Worcester, that completed the break with the traditional past of the English Church.²⁴ Within a century and a decade from the consecration of the conservative Lanfranc to Henry II's renunciation of the *Consuetudines* of Clarendon at Avranches after the murder of Becket, the battle had been won by the canonists. The next century, despite elements of resistance to the settlement saw generally the triumph of papal rule under the absent Richard, the collapse of John's opposition to Inno-

22 C. Mirbt, *Die Stellung Augustins in der Publistik des Gregorianischen Kirchenstreits* (Leipzig, 1888).

23 Z. N. Brooke, *The English Church*, 77-83.

24 *Cambridge Medieval History*, V., 516. The process of introducing Norman clerics began under Edward the Confessor; *Ib.*, III, 390. Lanfranc even tried to remove Wulfstan because he "was a simple and illiterate man, inasmuch as he did not understand the Norman language and would not be able to take part in the King's Councils." J. W. Lamb, *Saint Wulfstan* (London, 1933), 108-111, cf. 169f.

cent III, and the disturbances of the feeble reign of Henry III.²⁵

The keynote of the period is found in the opening chapter of Magna Carta: *Quod ecclesia Anglicana libera sit*. This clause has two aspects, a feudal aspect whereby the Church is to enjoy the *libertates* of any other feudal tenant-in-chief, including the right to its own courts against royal encroachment; and an ecclesiastical aspect, whereby Church men were free to follow canon law and the guidance of papal decretals without restraint.²⁶ The ecclesiastical development follows the lines of the canons of the Lateran Council of 1215.²⁷

This situation thus created endured until Edward I forced Archbishop Peckham to retreat from the position he had taken up at the Councils of Reading (1279) and Lambeth (1281). It was finally dispelled when Edward I resisted Boniface VIII's Bull *Clericis Laicos* (1296) by outlawry of the clergy. Archbishop Winchelsea then accepted the royal protection, and, as the Pope had withdrawn from his extreme position in 1297, the Convocations "granted taxes upon spiritualities without any renewed demand from the King."²⁸

In the process by which the liberty of the subject was established, the first step was the destruction of the liberties of the baronage, for a liberty was a privilege. The most powerful baron of the realm and the forerunner of Warwick as the king maker, was the Church or the *corpus ecclesiasticorum*, whose primary allegiance was not to the King but to the Pope. Hence it was in the development of the royal power that the hope of the liberty of the subject was to be found, and that principle appears both in the secular sphere and in the ecclesiastical. The field in which the battle was fought was the newly constituted Parliament and the law courts. The Statute of Mortmain (1279) was designed to check the growing power

25 Z. N. Brooke, *The English Church*, 211-229.

26 *Ibid.*, cap. I, for a discussion of the significance of the term *Ecclesia Anglicana*; cf. Maitland, *Canon Law and the Church of England*, 113-4, for the constitutional and legal position; for instances of the use of the form in the thirteenth century v. W. E. Lunt, *Papal Revenues in the Middle Ages* (New York, 1934), I, 332; II, 178, 394; W. S. McKechnie, *Magna Carta* (2nd. ed., 1914), 38ff., 191-195, 211.

27 M. Gibbs and J. Lang, *Bishops and Reform, 1215-1272* (Oxford, 1934), give a useful account of this period. Miss Lang's summary (174-179), which is sympathetic to Innocent III, suggests an echo of Bishop Stubbs (177), disguised under the waywardness of individual bishops.

28 Makower, *The Constitutional History*, 30-40; W. Stubbs, *Constitutional History*, II, 116-118, 130-136, 141-145; Maitland, *Canon Law and the Church of England* (for Peckham) 20-37, 117-122; *Cambridge Medieval History*, VII, 397-400, 408. On the question of the conflict of Laws on bastardy which continued throughout this period, v. Makower, *The Constitutional History*, 229, n. 10, 400-423, Maitland, *op. cit.* pp. 52-56.

of a realty corporation, which was exempt from feudal reliefs since it could not die. The Parliament of Lincoln (1301) rebutted Boniface VIII's claim to suzerainty over Scotland and provides a precedent to the Parliament of Westminster which rejected the Papal claim to lordship over England. The Statute of Carlisle (1307) stopped money going to superiors living abroad. Behind all were the lawyers who maintained the common and statute law of the realm against the pretensions alike of the Civil and Canon Law of Rome.²⁹

The next stage is reached in the situation produced by the Babylonish Captivity and the Great Schism combined with the Hundred Years' War. In the Statutes of Provisors (1351 and 1390), the crown with the support of the baronage was empowered to resist the process of papal provision in the case of benefices which had fallen vacant or been uncanonically filled. The history of provisions is significantly a continuation of papal war against local feudal influences, and so a development of the programme of Pseudo-Isidore.³⁰ By the Statutes of Praemunire (1353 and 1393), the control of the Crown over papal communications was re-established as in the days of William the Conqueror and penalties sufficiently severe were provided for its enforcement. It was under the threat of the penalties of *praemunire* that Henry VIII was to carry through his Reformation. In the meantime, however, movements were afoot to render the legislation of non-effect.

The claims of the papacy had revived opposition elsewhere. The work of the English Franciscan William of Ockham, together with Marsiglio of Padua's *Defensor Pacis* in opposition to the claims of John XXII was destined to find an English exponent in John Wyclif, who set forth arguments for the abolition of the Papacy and claimed for the king, as the Lord's Anointed, supreme authority within the national church. Wyclif was the father of the Tudor doctrine of the royal supremacy. The sympathy of Richard II for this movement and the increasing menace of the Hussite movement led to the overthrow of

29 Stubbs, *Select Charters*, 450-2, 495-6; also for the Writ *Circumspecte Agatis*, 469f.; *id.*, *Constitutional History*, II, 158-160; on the ultimate fate of Archbishop Winchelsea, 161; the Statute of Carlisle, 163; *Cambridge Medieval History*, VII, 410.

30 G. Barraclough, *Papal Provisions* (Oxford, 1935), 51-59. In this essay the author presents all that can be said in favour of the system but he does not take sufficient account of English opposition which led to the legislation against Provisors. His plea (124) might be met by *Usus non tollit abusum*. Makower, *The Constitutional History*, 41ff., 207, n. 31.

Richard and the advent of the Lancastrians.³¹ Henceforth the English Church was dependent on the good will of the crown for its continued independence; just as the crown relied on the support of the Churchmen. Parliament was discredited by the fact that legislative activity had outrun administrative genius; the forms of law became the means of oppression in the hands of the baronage; and the evils of a disputed succession led to the Wars of the Roses. The failure of the conciliar movement and the promulgation of Pius II's Bull *Execrabilis* completed the discomfiture of the constitutionalist both in Church and State. The combined effect of these movements was to render the royal revival, represented by the Statutes of Praemunire, abortive. Henry VII's title was too weak and his position too precarious to permit him to attempt any measure of ecclesiastical reform, though he left to his successor the legacy of the Act against Overgrown Corporations. In 1509, despite the centralization of the government and the humiliation of the baronage, the prospect of the reassertion of royal authority against the "overmighty corporation"—the Church—seemed remote. It was left to Wolsey to develop the full meaning of Papal overlordship and, ironically enough, "the liberty of the *Ecclesia Anglicana*" and to pave the way for Henry VIII's course of action when he found himself confronted with the opposition of canon law. Lothair II and his kingdom had succumbed to its power six and a half centuries earlier. The same threat overhung Henry and his kingdom. In both cases it was the ghost of Pseudo-Isidore.

Wolsey's career had prepared the conveyance of the *Ecclesia Anglicana*, as an ecclesiastical unit, from the Pope to the King. In the mediaeval church system, "Canterbury is a unit and York is a unit; but England is no unit. Too often we speak of 'the Church of England,' and forget that there is no ecclesiastically organized body that answered to that name. No tie of an ecclesiastical or spiritual kind bound the bishop of Chichester to the bishop of Carlisle, except that which bound them both to French and Spanish bishops."³² So Maitland warns the student of church history. The important fact to be noticed, however, is that *fiscally*, the *Ecclesia Anglicana* did exist, and it was regarded as a unit even in Rome in the same sense as it appears

31 *Cambridge Medieval History*, VI, 483, 490-491; H. M. Gwatkin, *Church and State in England to the Death of Queen Anne* (London, 1917), 114-115.

32 Maitland, *Canon Law in the Church of England*, 113-114.

to the English Crown in Magna Carta. Wolsey, who combined the office of *legatus a latere* with that of Lord Chancellor, therefore, represents the meeting point of the two strands. He prepared the English Church, furthermore, for submission to the king by his constant practice of overriding Archbishop Warham's metropolitan authority. His inability to fulfil his promise regarding the divorce or nullification of the marriage of Henry with Catherine of Aragon and the transfer of the suit to Rome brought home to Henry VIII the full meaning of the "vexatious appeals" which had so long worried his subjects. The time appeared to be ripe for the reassertion of the rights of the Teutonic King and Emperor over the claims of the Pseudo-Isidorian school of Latin churchmanship.

II. In turning to the second phase, covering the years 1528-1662, it is necessary to notice the danger of linking the English Reformation, consciously or unconsciously, with the Lutheran movement. The fact that Lutheranism was the topic of secret discussions in Cambridge taverns does not alter the fact that Henry VIII, in common with Erasmus, was opposed to Luther. He had gained his papal title *Fidei Defensor* in 1521 for a thesis against Luther, and refused to entertain the idea of any relations with the German Reformer. That fact did not, however, prevent his becoming perhaps the best specimen of Luther's Christian Prince, for despite their theological antagonism their common basis of opposition to the papacy was the Forged Decretals of Pseudo-Isidore. The real source and guide is to be found in Louis XII of France and his schism with the papacy under Julius II. There is evidence of the impression created by the episode on the mind of Henry, who remarked in a letter after Leo X had absolved Louis that the Pope's "lenity, founded on expediency would give a bad example in the future, would show how little it cost to create a schism and how useful a weapon against the papacy the threat of a schism afforded."³³ The date of this letter is 1514. Two years later the Concordat of Bologna was concluded, acknowledging the Gallican claims set forward in the Pragmatic Sanction of Bourges 1438. It was the Concordat of Bologna that saved France from the onslaught of the Reformation, when it came, by the recognition of the ancient rights of the King of France—the Gallican rights. When Henry took the field against the Pseudo-Isidorian position as-

³³ M. Creighton, *A History of the Papacy*, V, 218.

sumed by the papacy, it was for the recognition of the Anglican rights of the King of England that he fought.

There is some substantiation of this argument from contemporary events in England. Henry VIII "might be the most pious of kings, yet he was as determined as any to maintain the *regnum* against the *sacerdotium*, royal jurisdiction against ecclesiastical."³⁴ In 1512, a statute was passed by which "persons guilty of murder or robbery in church, highway or house should 'be not from henceforth admitted to his or their clergy' unless they were in holy orders." The attack of the abbot of Winchcombe on this statute in 1515 led the King to take "counsel of divers divines; and Standish maintained that the act was not against the liberty of the Church, as it was for the weal of the whole realm." The attempt on the part of Convocation to assert the authority of the Church was finally silenced by the King's pronouncement:

We are by sufferance of God, King of England, and the Kings of England in times past never had any superior but God; know, therefore, that we will maintain the rights of the crown in this matter like our progenitors; and as to your decrees, we are satisfied that even you of the spirituality act expressly against the words of several of them, as has been well shown you by some of our spiritual council. You interpret your decrees at your pleasure; but as for me, I will never consent to your desire, any more than my progenitors have done.³⁵

Henry three years later nominated Standish to the see of Saint Asaph, much to the chagrin of Wolsey. The episode is significant in that it shows that Henry VIII was as ready to maintain Anglican rights as Louis XII was to enforce Gallican rights within the body of the Church, and, for the next phase, Leo X had taught him the salutary value of the threat of schism. Thirteen years later, after the capture of Rome by Charles V, an imperialist wrote to the Emperor:

Everyone considers that it has taken place by the just judgment of God, because the Court of Rome was so ill ruled. . . . We are expecting to hear from your Majesty how the city is to be governed and whether the Holy See is to be retained or not. Some are of the opinion it should not continue in Rome, lest the French King should make a patriarch in his kingdom, and deny obedience to the said see, and the King of England and all other Christian princes do the same.³⁶

34 K. W. M. Pickthorn, *Early Tudor Government*, II, 111.

35 *Ibid.*, II, 116-117.

36 A. F. Pollard, *Henry VIII*, 172. The threat of a French Patriarchate at Rheims appears to have been a constant source of apprehension to Rome. Professor Previté Orton once suggested that it was this fear which accounted for Nicholas I's hostility to Hinemar.

It was at this point that the suit of Henry VIII was put forward, and by the irony of fate, the rôle of the Bishop of Rome as the impartial judge, according to the Pseudo-Isidorian requirements, was vitiated by the control of Charles V, the nephew of Catherine of Aragon.

In turning to the acts of the Reformation Parliament, the first point to be noticed is that the attack on the *sacerdotium* falls within the realm of *de facto* taxation—the limitation of clerical fees for probate and mortuaries. In essence it is a fiscal act, and, on the principle *quod omnes tangit ab omnibus approbetur*, it constitutes the assertion by Parliament, already conscious of its rights, of its determination to control all forms of taxation. The notice of this element in the struggle, further illustrated by the Restraint of Annates, the stopping of Peter's Pence and the costly appeals to Rome, whereby the wealth of the Realm was sorely depleted, will be sufficient to make the point clear that the control of the Church and the control of taxation are to be regarded as two aspects of the same problem.³⁷ The fact, already noticed, that the Tudor Reformation left the administration and control of canonical legislation in the hands of the King in Council instead of the King in Parliament, does not affect the issue in the least, for the fight between Parliament and the Council for control had not yet arisen.

"The policy of the Tudors which struck at the liberties of overmighty subjects was also directed against the immunities of an overmighty corporation."³⁸ The key to the attack is to be found in the issue between the canonist's view and the royal view of the place of the clergy within the Realm. The *sacerdotium* claimed absolute immunity from royal control on the Pseudo-Isidorian hypothesis of the supremacy of the spiritual—that the humblest priest is greater than the mightiest Emperor—a principle which is fundamental to Canon Law. In fact canon law, in its later form, is but the codification and amplification by subsequent decretals and conciliar canons, of Pseudo-Isidore's *Corpus Canonum*, which was the most complete of the ninth century collections. The means by which the attack was carried into effect was the Statute of *Praemunire* (1393).

In January, 1531, the Attorney-General was instructed to proceed against the bishops on the ground that in acknowledg-

37 J. R. Tanner, *Constitutional Documents*, 13.

38 *Ibid.*, 14.

ing the jurisdiction of Wolsey as papal legate, the whole body of the clergy had incurred the penalties of *praemunire*. The spiritual subjects of the crown were pardoned by Act of Parliament, on payment of a heavy subsidy, and as "divers froward persons would in no wise assent to it except all were pardoned, saying that all men which had anything to do with the Cardinal were in the same case," the people were pardoned too.³⁹

The way was now clear, and all that remained for Henry to do was to release the Commons against the clergy. The Tudor Parliaments were by no means the slavish tools of royal authority that they have too frequently been portrayed to be. They had resisted Wolsey at the height of his power. In those days, however, they lacked leadership and the Commons were an inexperienced House. The leadership, therefore devolved on the King, whose ideas in regard to the Church were at one with those of the majority in the Commons. In the fight which followed, Parliament (like the States-General and *Parlement* in France against Boniface VIII and Julius II) supplied the King with all the means necessary to wage war with the papacy. The Clergy looked on helplessly, for "under the sinister shadow of *praemunire* . . . all power of constitutional opposition was broken down." The English device of *praemunire* was the layman's reply to the canonist's device of excommunication.⁴⁰

The next move was to bring back the spiritual subjects of the King under the jurisdiction of the crown. William I had imprisoned Odo of Bayeux not as a bishop but as a baron; the fall of Wolsey had been brought about in virtue of his tenure of the Lord Chancellorship. As ecclesiastics each considered himself immune. Temporal office was the Achilles' heel of the churchman. The first attack on this position came in the form of a petition—*The Supplication against the Ordinaries*, March, 1532. There is no real reason for assigning the source of this

39 H. Gee and W. J. Hardy, *Documents illustrative of English Church History* (London, 1910), 145-153; for the historical commentary and setting of the following documents v. J. R. Tanner, *Constitutional Documents*, 13-22; F. Makower, *The Constitutional History*, 48-58.

40 The term *Praemunire* is so frequently used merely as a species of clerical bogey that it may be well to point out its real significance. The Acts of Praemunire "fortified" the King "ahead of time" against excommunication by the Pope by placing at his mercy (*in misericordia sua*) anyone who exercised, without the royal permission, the functions of the Pope, or the Pope's agent, within the Kingdom. In other words, anyone offending under the act was *ipso actu* already an outlaw, and therefore an excommunicated person. The obsequious conduct of the Clergy was due to the knowledge of the vulnerability of their position.

petition to the court, though without doubt it was touched up there, probably by Cromwell. The first chapter gives the prevailing note which runs through the whole.⁴¹

First, where the prelates and spiritual ordinaries of your most excellent realm of England, and the clergy of the same, have in their convocations heretofore made and caused to be made, and also daily do make, many divers fashions of laws, constitutions and ordinances, without your knowledge or most royal assent, *and without the assent and consent of any of your lay subjects*; unto the which laws your said lay subjects have not only heretofore and daily be constrained as well in their *bodies, goods and possessions*, but also be compelled to incur daily into the censures of the same, and be continually put to *importable charges and expenses*, against all equity, right and good conscience. And yet your humble subjects nor their predecessors could ever be privy to the said laws . . . ; which laws so made your said most humble and obedient subjects, under the supportation of your majesty, suppose to be not only to the diminution and derogation of your imperial jurisdiction and prerogative royal but also to the great prejudice, inquietation and damage of your said subjects.

The second and third chapters deal with the oppressions of the ecclesiastical courts, wherein "many of your said most humble and obedient subjects . . . be daily convented and called . . . sometimes at the pleasure of the said ordinaries and substitutes, for malice without any cause; and sometimes . . . without any Lawful cause of accusation or credible fame proved against them, and without any presentment in the visitation—be inquieted, disturbed, vexed, troubled, and put to excessive and improbable charges to them to bear, and many times be suspended and excommunicate for small light causes upon only the certificate of the proctors of the adversaries . . ." The fourth chapter deals "with the great and excessive fees taken in the said spiritual courts." The fifth to the eighth deal with definite fiscal and financial grievances and the evils of provisions of infants to benefices; the ninth, the excessive number of holy days; the tenth to the twelfth deal with wrongful imprisonment, the inability of persons to obtain remedy for wrongful vexation and the injustice of the process of trial and examination. The king is then asked

graciously to provide . . . some such necessary and behoveful remedies as may effectually reconcile and bring in perpetual unity your said subjects, spiritual and temporal . . . as the only head, sovereign lord, protector and defender of both the said parties, in whom and by whom the only and sole redress, reformation and remedy herein absolutely rests and remains.

⁴¹ Gee and Hardy, *Documents*, 154-176.

It was to satisfy this request and to restore the acknowledged customs and dignities of the realm that the Establishment came to be devised.

The "Answer of the Ordinaries"⁴² was presented to the King at the end of April and on the 30th of that month, it was handed to the Speaker and a deputation from the Commons, with a hint of the royal opinion:

"We think," Henry said, "that their reply will smally please you, for it seemeth to us very slender. You be a great sort of wise men. I doubt not but you will look circumspectly on the matter, and we will be indifferent between you."

The reply took the line that if the matters of complaint had really occurred, it was the fault of individuals and not of the system or the body of the clergy as a whole. The demand that the canons be submitted to the King was met by the reply that "We may not submit the execution of our charges and duty certainly prescribed by God to your highness's assent"; they protested against the invasion of the rights of the Provinces of Canterbury and York by the legislation already imposed by the King in Parliament. In a second "Answer," however, they offered not to publish any further canons henceforth without the King's consent, unless it were for the maintenance of the faith. In the words of the *Report of the Archbishops' Commission of 1935*, they demanded or asserted "the spiritual freedom" of the Church.⁴³ "The faith," however, had been too often a broad highway on which treason could ride with impunity. The issue at stake was, moreover, one of jurisdiction and sovereignty. On May 11th, therefore, the King addressed the Speaker and a deputation from the Commons:

Well beloved subjects, we thought that the clergy of our realm had been our subjects wholly; but now we have well perceived that they be but half our subjects—yea, and scarce our subjects. For all the prelates at their consecration make an oath to the Pope clean contrary to the oath they make to us, so that they seem his subjects and not ours.⁴⁴

The day before, Henry had sent three articles to Convocation for its acceptance, and on May 15th, the Clergy in Convocation submitted, *in verbo sacerdotii*, to the demands

(i) to enact no new canons, unless the king should license them

⁴² J. R. Tanner, *Documents*, 21-22.

⁴³ *Church and State, 1935*, 18.

⁴⁴ J. R. Tanner, *Documents*, 22.

to make such canons, and thereto should give his royal assent and authority; (ii) to submit all canons heretofore enacted to the King and a commission of thirty-two persons chosen by him; (iii) canons determined by the majority of the commission "not to stand with God's laws and the laws of the realm to be abrogated and taken away by your grace and the clergy," and those approved by the commission "to stand in full strength and power, your grace's most royal assent and authority once impetrate and fully given to the same."

This submission was embodied in the statute of 1532, and again in 1534, together with the Restraint of Appeals, by which the *Ecclesia Anglicana* was finally cut from the jurisdiction of a foreign and alien canon law.⁴⁵

These Acts, after mentioning the abuses of canonical legislation in the past and providing legislative authority for the submission of the clergy and the revision of canon law, provides "alway that no canons, constitutions or ordinance shall be made or put in execution within this realm by authority of the convocation of the clergy, which shall be contrariant or repugnant to the king's prerogative royal, or the customs, laws, or statutes of this realm." By this part of the Act, any further legislation unauthorized or unapproved by the King was stopped, and the door was closed to innovation. By the second part of the Act, the door was closed to external avenues of canonical jurisdiction. Appeals from the Archbishops' courts, which had hitherto passed to Rome now passed to the king's Court of Chancery,

And that upon every such appeal, a commission shall be directed under the great seal to such persons as shall be named by the King's highness, his heirs or successors, like as in case of appeal from the admiral's court, to hear and definitely determine such appeals, and the causes concerning the same.

This court came to be known as the Court of Delegates and lasted until 1832, when its jurisdiction "was transferred by statute to the Crown in Council. It is now exercised by the Judicial Committee of the Privy Council created in 1833." The parallel with the Admiralty is significant for, whereas the Church had heretofore based its procedure on canon law, the

⁴⁵ Gee and Hardy, *Documents*, 176-178, 187-195, combined in 195-200; J. R. Tanner, *Documents*, 20-25, 40-46. Cf. Maitland's remark, "The Statutory Reformation of the English Church began with an act that was aimed not at Rome but at Canterbury." (*Canon Law in the Church of England*, 120, 87ff.)

Admiralty Court's procedure was civil law—both of Roman origin.⁴⁶

The Act continues by imposing the penalties of *præmunire* on any who should "provoke or sue any manner of appeals of what nature or condition soever to the said Bishop of Rome or do procure or execute any manner of process from the see of Rome, or by authority thereof to the derogation or let of the due execution of this Act." The concluding chapter summarizes the position of Canon Law in England down to the present time:

Provided also that such canons, constitutions, ordinances and synodals provincial being already made, which be not contrariant or repugnant to the laws, statutes, and customs of this realm, nor to the damage or hurt of the king's prerogative royal, shall more still be used and executed as they were afore the making of this Act, till such time as they be viewed, searched or otherwise ordered and determined by the said two-and-thirty persons, or the more part of them, according to the tenor, form and effect of this present Act.⁴⁷

It is unnecessary here to carry the argument further, apart from noticing the fate of the proposals regarding canon law. The committee was not appointed by Henry. Instead, he prohibited the study of canon law.

No step that Henry took was more momentous. He cut the very life thread of the old learning. The ecclesiastical judges in time to come might administer such of the ancient rules as were not contrariant or repugnant to the laws (newly interpreted) of God and the statutes of our lord the king; but they would not have been, like their predecessors in time past, steeped and soaked for many a year in the papal law-books and their ultra-papal glosses.

In its place, he encouraged the study of Civil Law, with its theory of *Caesaro-Papalism* and its disciples

might also learn to loathe and despise it (Canon Law) as a mass of bad Latin and brutal ignorance, the product of dark ages, in which the sacerdotal lust for power had filched from kings and princes of the earth their God-given rights.⁴⁸

A commission was appointed by Edward VI in November, 1551, under the Act of 1549, but the work was not finished within the limited period of three years from the date of the Act, and

46 J. R. Tanner, *Documents*, 40, 359f.; O. J. Reichel, *The Elements of Canon Law* (London 1897), 287.

47 Gee and Hardy, *Documents*, 200, cf. 177f., 196-8.

48 F. W. Maitland, *Canon Law and the Church of England*, 92-95.

though we find from the Journals of the house of Lords that a bill was introduced for the renewal of the act, and made some progress in both houses, it had not passed into a law on the 15th. of April 1552, on which day the parliament was dissolved.⁴⁹

No further attempt was made to renew the Act of 1549, and the revision was not printed until 1571, and then without authority.

It does not indeed appear to have been adopted by the queen and her government, but it was published, as Foxe intimates, for the purpose of being used in Parliament. . . . But it made no progress.⁴⁹

Nothing further was done until 1603, when Bancroft obtained James I's license. Convocation drew up the Canons, which were sanctioned by charter of the King but were not confirmed by Parliament. Both in the Commons and in the Courts they were opposed, although James I exerted considerable effort to persuade Chief Justice Coke to acknowledge their applicability to the laity. Coke refused on the grounds that inasmuch as they had not received the consent of Parliament, they could not be held to bind the laity. *Quod omnes tangit, ab omnibus approbetur*.

The position governing the application and validity of canon law in England can be summed up as follows. First, concerning the canon law in existence before 1603.

The Common Law was always disposed to recognize these constitutions [of Lyndewode], while to General Canon Law it always manifested considerable averseness. But it has always been the doctrine of the Temporal and Ecclesiastical Courts, since the Reformation that the constitutions contained in Lyndewode, and the general usages of the Church, and certain portions of Canon Law admitted by those usages are still binding upon the Church of the realm.⁵⁰

In 1881, Lord Blackburn, in his judgment in the case of

49 E. Cardwell, *The Reformation of the Ecclesiastical Laws*, (Oxford, 1850), vii-ix, xi-xii. "Hence the seventh clause of the 'Act of Submission' continues in its former force the whole of the Canon Law which is 'not repugnant to the laws, statutes and customs of the realm nor to the damage and hurt' of the royal prerogative." J. H. Blunt, *The Book of Church Law*, revised by Sir W. G. Phillimore, Bart. and G. Edward Jones (1901), 23f.; but cf. Coke on *Cawdrey's Case* (J. R. Tanner, *Documents*, 362, 372f.), and A. Amos, *Observations on the Statutes of the Reformation Parliament* (London and Cambridge, 1859), 268-270.

50 Sir Robert Phillimore in *Martin v. Mackonochie*, L. R. 2. A and E 116 at p. 153 qu. in J. M. Dale, *The Clergyman's Legal Handbook*, 7th ed., rev. by J. S. Risley (London, 1898), 2.; but see F. W. Maitland, *Canon Law*, 40-50 on Lyndwood.

Mackonochie v. Lord Penzance, gave the following ruling⁵¹:—

The ecclesiastical law of *England* is not a foreign law. It is a part of the general law of *England*—of the common law—in that wider sense which embraces all the ancient and approved customs of *England* which form law, including not only that law administered in the Courts of Queen's Bench, Common Pleas, and Exchequer, to which the term Common Law is sometimes in a narrower sense confined, but also that law administered in Chancery and commonly called Equity, and also that law administered in the Courts Ecclesiastical, that last law consisting of such canons and constitutions ecclesiastical as have been allowed by general consent and custom within the realm—and form, as is laid down in *Caudre's Case*, the king's ecclesiastical law. All these laws may be and are altered by statutes. When the question arises what is the English ecclesiastical law, it is not ascertained by calling witnesses to prove it, as if it were a foreign law, but taking judicial notice of what the law is, it is ascertained by argument founded on legal principles and authorities, what the law is on the particular point. . . .

In determining this question I think great weight should be given to the principles of ecclesiastical law, laid down by those ancient writers on the ecclesiastical law of *England* whose treatises have been accepted by the Judges in the Ecclesiastical Courts as of authority. Some weight is to be given to foreign jurists who treat of the law ecclesiastical as practised in foreign countries, but much less weight, for it may well be that they are treating of ecclesiastical constitutions which have never been accepted and received in *England*.

In other words, the validity of canon law in England is limited by common law and statute. In this respect the same position prevails as prevailed before the Reformation.⁵² Stubbs, and later Ogle, attempted to maintain that the *Ecclesia Anglicana* had determined how much it would accept and how much it would reject of canon law. Maitland disposed of the argument by showing that the English Church would have accepted the whole body of canon law, but the State imposed the limits of its admission.⁵³ The heresy, however, has been reasserted in vague and diluted form in the *Report* of 1935.⁵⁴

The whole question of the relations of canon law, ecclesiastical law, and common law, as well as the question of the validity of the *Canons of 1603*, was finally settled by Lord Hardwicke's⁵⁵

⁵¹ *Mackonochie v. Lord Penzance* (1881), 6 *App. Cas.*, 446.

⁵² Cf. Sir Matthew Hales, *The History of the Common Law* (1713), 27.

⁵³ *Infra*, pp. 340f.

⁵⁴ *Church and State*, 1935, 6, 10, 12-13, 26-29, 36, 41f., 57-60 etc.

⁵⁵ Philip Yorke, 1st. Lord Hardwicke, (Lord Chancellor, 1737-1756). For particulars of his life *Dictionary of National Biography*, lxi, 346-353 (J. M. Rigg); *Encyclopædia Britannica* (11th ed.), (R. J. MacNeill). G. Harris, *Life of Lord Hardwicke*, I, 292; II, 484ff., records his hostility to clandestine marriages,

judgment in the case of *Middleton v. Crofts* (1736).⁵⁶

John Middleton and his wife were articled against in the ecclesiastical court [of the Bishop of Hereford] for being married out of canonical hours, without licence or banns, and in a private house; a prohibition⁵⁷ was applied for upon a suggestion that the power of the ecclesiastical court was taken away by the statute of 7 & 8 Will 3, cap. 35, by which penalties were laid on the clergyman marrying, and the parties married without banns or licence, which penalties were to be recovered in the temporal court: In order to bring the matter fully before the court, a rule was made for a prohibition. . . .

The plaintiffs set forth the penalties under the temporal law (7 & 8 Will. 3, c. 35.) and proceeded to state,

That although the lay people of this realm are not subject to, or any way punishable by, any canons or constitutions ecclesiastical; yet nevertheless, that the vicar general of the bishop of Hereford, intending unjustly to oppress the plaintiffs, and to draw a cognizance of a plea which belonged to our sovereign Lord the king to another trial in the court Christian, had at the promotion of the defendant, articled against the plaintiffs in the following manner, *videlicet*:

That by the laws, canons and constitutions of this realm, it was required that all persons, before they shall be given together in holy matrimony, should obtain a faculty, or licence, from the ordinary, or have the banns published according to the book of common prayer, and be married in the church or chapel, between the hours of eight and twelve in the forenoon; and that all persons offending these premisses, or any of them ought to be punished by the said laws, canons or constitutions.

There follows the statement of the circumstances of the case and

against which he was the author of the Act (26 Geo. II, c. 33) which bears his name.

56 *John Middleton and his wife, v. Thomas Crofts*, 1736, Str. 1056, 2 Atk. 650; confirmed, *Bishop of Exeter v. Marshall*, 1866-7-8, L. R. 3 H. L. 17; followed *R. v. Allen*, 1872, L. R. 8 Q. B. 75; distinguished *Jenkins v. Cook*, 1875, L. R. 4 Ad. & Ecc. 489; see *Mackonochie v. Lord Penzance* 1881, 6 App. Cas. 445; followed *R. v. Archbishop of York*, 20 Q. B. D. 747. For the general setting of the controversy in 1603ff. *v. supra* n. 13.

57 On the process and writs of prohibition, *v. Makower*, *The Constitutional History*, 238, nn. 7-8, 242, n. 4, 244 n. 10, 435, n. 153; Sir Frederick Pollock and F. W. Maitland, *The History of English Law* 2nd ed., (Cambridge, 1911), I, 251, 479; II, 199-202, 596, 665; W. W. Holdsworth, *History of English Law*, (3rd ed., (1922), 553-559, 610-611; Adams, "The Writ of Prohibition to Courts Christian" (1936) 20. *Minnesota Law Rev.*, 272. Writs of Prohibition have been abolished under the *Administration of Justice (Miscellaneous Provisions) Act, 1938*, 1 & 2 Geo. VI, c. 63, sec. 7, and in its place "the Court may make an order" . . . to "be called . . . an order of prohibition." By sub-section (14) "No return shall be made to any such order and pleadings in prohibition shall be allowed, but the order shall be final, subject to any right to appeal therefrom." I am indebted for the last two references to the kindness of Professor E. N. Griswold of Harvard University; and to Dr. E. C. Wade for calling my attention to the change in the writ system contemplated under the statute.

then the declaration alledges, that the court Christian hath no jurisdiction or cognizance of this matter, and that it is a mere temporal offence punishable by the statute that the plaintiffs delivered to the defendant, the king's writ of prohibition; but, notwithstanding that, the defendant continues to prosecute the plaintiffs in the said court in contempt of the king, to the damage of the plaintiffs, and contrary to the writ of prohibition.

Lord Hardwicke, in his judgment, divided the issue into three questions:

First, Whether, by virtue of the canons made in 1603, lay persons are punishable by ecclesiastical censures for a clandestine marriage, had without banns or licence.

Secondly, If lay persons cannot be prosecuted or punished by force of these canons, whether the court had jurisdiction of such a cause against them by the ancient canon law, received and allowed within the realm of England.

Thirdly, supposing the spiritual court had a jurisdiction on either of those grounds, whether that jurisdiction is taken away by the operation of the Statute 7 & 8 Will. 3, cap. 35, sect. 4, which inflicts a fine of £10 for this offence, to be recovered in the king's court.

The first of these questions ought regularly to be divided into two.

First, Whether these canons made in 1603, which relate to clandestine marriages, do, in the words and provisions thereof, extend to the parties contracting matrimony, or affect the laity in such a case as is now before the court?

Second, If lay persons are within the words of these canons, whether the authority, by which these canons were made, can bind the laity as to this matter?

As to the first of these two questions "Lord Hardwicke showed that of the canons relating to clandestine marriages (*viz.* 62, 101, 102, 103, 104) the last clause of the 104th canon alone could be said to apply" and, on account of fact, "it does not appear to us that the provisions of the canons of 1603 do extend to the laity in such a case as is now before the court."

As to the second question, "But, supposing lay persons might be within the words of the canons in 1603, the next consideration is, whether the authority, by which those canons were made can bind the laity as to this matter," Lord Hardwicke pointed out that though it was

a question of very extensive learning, upon which there is some appearance of variety in the law books, notwithstanding which I always understood till it was disputed in this cause that the law in latter times has been universally taken to be, that the canons of 1603 did not bind the laity for want of a parliamentary confirmation . . . it has become neces-

sary to examine and determine a point of so great consequence to the constitution of *England* in order to settle the law thereupon.

And upon the best consideration that we have been able to give it, we are all of opinion, that the canons of 1603, not having been confirmed by parliament, do not *proprio vigore* bind the laity; I say *proprio vigore*, by their own force and authority: for there are many provisions contained in these canons, which are declaratory of the ancient usage and custom of the church of *England*, received and allowed here, which, in that respect, and by virtue of such ancient allowance, will bind the laity; but that is an obligation antecedent to, and not arising from, this body of canons.

He proceeds to discuss the nature of the early sources of church law, noticing the mixed assemblies of nobles and clergy and indicating, after the coming of the Norman line the frequency of "a mixture of the legantine authority, which arose merely by papal usurpation" and concludes:

Upon this important question, therefore, it is safest for judges to proceed upon sure foundations, which are, the general nature and fundamental principles of this constitution, acts of parliament, and the resolutions and judicial opinions in our books, and from these draw our conclusions.

No new laws can be made to bind the whole people of this land, but by the king, with the advice and consent of both houses of parliament, and by their united authority; neither the king alone, nor the king with the concurrence of any particular number or order of men, have this high power.

The binding force of these acts arises from that prerogative which is in the king, as our sovereign liege lord, from that personal right which is inherent in the peers and lords of parliament, to bind themselves, and their heirs and successors, in their honours and dignities, and from the delegated power vested in the commons, as the representative of the people, and therefore Lord Coke says, 4 *inst.* 1, these represent the whole commons of the realm, and are trusted for them by reason of this representation, every man is said to be party to, and the consent of every subject is included in an act of parliament; but in canons made in convocation and confirmed by the crown only, all these are wanting, except the royal assent; here is no intervention of the peers of the realm, nor any representation of the commons.

Hardwicke then deals with the attempt of Dr. Andrews to avoid the force of this objection and by an appeal to the writ of summons he distinguishes between the representative character of the commons although "many ranks of men amongst the commons had not votes," and the non-representative character of convocation, save for the estate of the clergy, "who are either present in person or by representation," quoting

Coke.⁵⁸ The binding force of ancient canons over laymen, moreover, "was not derived from any particular prerogative or supremacy of the emperors, as head of the church, but from the supreme legislative power being vested in his person; for after the *Lex Regia* . . . the whole power of making laws, however originally gained by usurpation, was devolved upon the emperor; and by consequence, when a canon was made by the council, and confirmed by the emperor, it had the concurrence of everything necessary to make it a complete law. . . . But the case is far otherwise in England, where the king has but part of the legislative power." So the question still remained, Whether the law of *England* has deposited in the crown the sole power of confirming canons to bind the laity without the advice and consent of parliament."

The continuation of the judgment is significant in linking the argument of taxation and canonical legislation:

Another argument, of the like kind with the former, is, that by the *English* constitution, the power of binding by new laws, and that of charging with taxes, are concomitant and co-extensive, and those who have authority to do the one, can do the other; thus the parliament makes laws obligatory upon the whole nation, and they impose taxes to be levied upon all the people: but the clergy in convocation never pretend to have power of granting tenths or fifteenths, or other taxes to charge any persons but themselves; and by analogy from hence, can make no canons or ordinances but only to bind themselves, *i. e.* the body there assembled or represented.

To pursue the argument a little further, and to infer the consequences which naturally result from it, it seems almost an absurdity to say that the clergy in convocation cannot charge the laity with one farthing by way of tax or imposition, cannot even create a new fee to be paid to them, and yet may erect new laws to bind them *in re ecclesiastica*, for disobeying which they shall incur the penalty of excommunication, which is to be carried into execution by a loss of their liberty, and a disability to sue for and dispose of their personal estate:⁵⁹ this would certainly be to affect the laity in their property in a high degree; and yet it is admitted that the clergy in their synodical acts cannot charge the property of the laity.

It is pointed out that since the Reformation, "the whole doctrine and worship the very rights (*sic*) and ceremonies of the church, and the literal form of publick prayers are prescribed and established" [by the several acts of uniformity], not merely for the sake of enforcing them by civil sanctions

⁵⁸ 4 Inst. 322.

⁵⁹ For penalties of Excommunication, *v.* Blackstone, *Commentaries*, III, 101f.

and temporal penalties. That may have been one reason for it, "but," continues the judgment, "I cannot be persuaded that it was the only reason, since if it had been the prevailing opinion of those times, that the clergy in convocation could make new canons to bind the laity, it is most unaccountable that they should not think it proper to trust any regulations of the most minute consequence to the proper force of canon or synodical decree, which if lawfully made might be carried into execution by excommunication, and the consequences attending upon it were a sanction fully sufficient to enforce it."

He dismisses the argument put forward "that the legislative power of the clergy in convocation is co-extensive with the judicial power of the spiritual courts, concluding

Everybody sees how it would enable them without the consent of parliament to change the law relating to heirship and descents of lands,⁶⁰ and likewise relating to personal estates which are now become of prodigious value, and relating to the payment of tithes which much concerns temporal interests and property, and also as to several crimes, whereby the personal liberty of the subject may be consequentially affected upon their significavits. This attempt therefore to make the power of the convocation in ordaining canons, co-extensive with the judicial authority of their courts is full of such strange consequences, and of so much mischief, that it cannot be contended for, with any shadow of reason, or of law.

He then reviews certain cases and statutes⁶¹ before passing to the second head of argument, in which he reviews the legislation of Henry VIII, and points out "even this statute [25 H. 8. c. 19]⁶² is in the words of it silent as to the persons over whom the obligations of canons may extend," and observes

First, That both the king and clergy thought it necessary, or at least very expedient, to take along with them the concurrence and authority of parliament (25 H. 8. c. 19) for abrogating part of the ancient canons, and for confirming and establishing such part as was to remain in force: if the opinion had then prevailed that the convocation, with the consent of the crown, could have ordained canons to bind the whole realm, laity as well as clergy, the king with the convocation (who had just then given the strongest evidence of their submission to his will) might have found many and easy ways of doing it without resort to parliament; but the wisdom of those times chose to rely upon this other method.

Secondly, If the design of reviewing and reforming the ancient canon law, by commissioners authorised by those acts of parliament, had been

60 The reference is to the tests of legitimacy, *v. supra*, n. 28.

61 25 H. 8. c. 19, continued in 27 H. 8. c. 15, 35 H. 8. c. 16, 3 & 4 E. 6. c. 11.

effectually carried into execution, every body must have admitted, that the system of ecclesiastical laws which they had approved, would have derived its binding force over the whole realm from the legislature; for nothing is more certain in law than this, that when any act is done under a power, that act is deemed to be done by the grantor of the power, and to have its validity from him, and not from the person that executes it. This must be obvious to that King who passed the first of those acts of parliament, who was as jealous of his prerogative, as any Prince who ever sat upon the English throne.

He then proceeds to examine the cases cited in the pleading on both sides.

The second general question in the case was "admitting that the lay persons cannot be punished for a clandestine marriage by virtue of the canons of 1603, whether the spiritual court had jurisdiction of such a cause against them by the ancient canon law received and allowed within the realm of *England*; and we are all of opinion that the spiritual court had such a jurisdiction."

The general principle is based on Coke in *Cawdrie's case*, already cited, and the Acts of Henry VIII, (25 H 8 cc. 19, 21, 35 H. 8, c. 16) and Hale, who pointed out

that when Christianity was first introduced into this island, it came not in without some form of external ecclesiastical discipline (or coercion) though at first it entered into the world without it; but that external discipline could not bind any man to submit to it, but either by force of the supreme civil power, where the governors received it, or by the voluntary submission of the particular persons that did receive it; if the former, then it was the civil power of this kingdom which gave that form of ecclesiastical discipline its life; if the latter, it was but a voluntary pact or submission, which could not give it power longer than the party submitting pleased, and then the king allowed, connived at, and not prohibited it, and thus by degrees . . . introduced a custom, whereby it became equal to other customs or civil usages." In the case in question, it remained to be seen "whether that part of the canon law which prohibits clandestine marriages, hath been received and allowed in *England*."⁶²

After reviewing the legal authorities quoted, Hardwicke ultimately based his opinion of the Common Pleas judges in the case of *Mattingley versus Martius* (1632), namely "That if any person marry without publication of banns or licence, dispensing with it, they are citable for it into the ecclesiastical court, and no prohibition lies."

⁶² Compare the statement up to this point with Jefferson's views, R. J. Mott, "Jefferson's Ecclesiastical Views," n. 44.

The remaining question is, therefore, what is the effect of a statute imposing temporal penalties for an offence (in particular 7 & 8 W. 3, c. 35 s. 4, which inflicts a penalty of £10 for this offence, to be recovered by the King's Court), on the jurisdiction of the spiritual court.

The opinion of the court was "that this statute hath no operation to take away the ecclesiastical jurisdiction as to the husband clandestinely married."

The rule of *Nemo bis puniri debet pro eodem delicto* holds when both the statute and the ecclesiastical censure are directed against the same identical offence. In the case of the Act of Uniformity, 1662, a pecuniary penalty "is inflicted directly and *co nomine* for a punishment of the same offence, and in the same respect for which the spiritual judge inflicts the punishment of excommunication; the intent of the temporal punishment is to prevent the supposed mischief of unlicensed persons teaching school, and so is the intent of the ecclesiastical censure; and as the penance enjoined is a satisfaction to the publick for that offence, so is the penalty of the statute." In this case the statute abrogates the ecclesiastical censure. In the case of the statute 7 & 8 W. 3, c. 35, there is a difference in intention.

The ecclesiastical censure is to punish the offence directly *co intuitu* as it is a clandestine marriage, a crime against the publick order of the church, and of great inconvenience, and of evil example; the statute inflicts a penalty in respect of another consequence arising from it, as it infers a fraud and diminution of the publick revenue; and this restriction does not arise by construction but by the express declaration of the legislature themselves.

This distinction is the same, but stronger, as the common case of the statute 18 Eliz. c. 3 which deals with the punishment of the mothers and reputed fathers of bastard children, not "upon an act of lewdness . . . as a spiritual offence, and mere inconvenience, but to prevent undue charges being brought upon parishes. The spiritual court punishes it by penance and ecclesiastical censures, as it is a crime of incontinence, a spiritual offence, a publick scandal to the church; the statute punishes a consequence arising from it"—the unjust burden on the charge of the parish where the bastard is born. And "these punishments being *diverso intuitu*, in these different respects, the one for the criminal act directly, the other on account of a

particular evil consequence arising from it, have been suffered to go on hand in hand ever since the making of the statute and it was never imagined that the one had repealed the other."

He disposed of "the common argument which hath generally been made use of to support proceedings in the spiritual courts for offences punishable in the temporal courts; that argument is that the former proceed only *pro salute animae* of the offender, but the latter punish him either in body or purse," by showing "that it is a distinction in words without a real difference for all punishment is intended for the reformation of the offender, and an example to others; this is the end both of the ecclesiastical censure and the temporal penalty, when they are both inflicted immediately and directly for the same thing; but it is otherwise here, where the ecclesiastical censure is for the criminal act, and the temporal penalty for a fraud, consequentially arising from that act; further, there is another ground to support this proceeding in the spiritual court; and to distinguish the case from those which have been above cited. The rubrick prefix to the office of matrimony in the book of common prayer, both those of 2 & 8 Ed. 6, and 13 & 14 Ch 2," confirmed by the several acts of uniformity in regard to the publication of the banns.

By Elizabeth's *Act of Uniformity* (1558, section 16),

Arch-bishops and bishops, and all other their officers exercising ecclesiastical jurisdiction, as well in places exempt as not exempt within their dioceses, shall have full power and authority by this act to reform, correct and punish, by censures of the church, all and singular persons which shall offend within any of their jurisdictions or dioceses against this act, and statute; any other law, statute, privilege, liberty or provision heretofore made, had or suffered, to the contrary notwithstanding.

The Act of Uniformity of 1662, section 24, reads

And be it further enacted, that the several good laws and statutes of this realm which have been formerly made, and are now in force for the uniformity of prayer, and administration of the sacrament within this realm of *England*, and places aforesaid, shall stand in full force and strength, to all intents and purposes whatsoever, for the establishing and confirming the said book of common prayer, &c., herein before mentioned, to be joined and annexed to this act, and shall be applied, practised and put in use, for the punishing all offences contrary to the said laws, with relation to the book aforesaid, and no other.

Lord Hardwicke therefore concludes:

1. That the laity are bound by the rubrick against inarrying without publication of banns;
2. That by the express words of the act of uniformity, 1 Eliz. they are punishable by the censures of the church for acting contrary to it;
3. That by the act of uniformity, 13 & 14 Car, 2, this power of the ordinary is continued, and directed to be applied and practised for punishing the like offence against the rubrick of the present book of common prayer.

In the Statute (7 & 8 W. 3, c. 35) "no sort of notice is taken of the act of uniformity, but the provision declared to be for a different purpose, the securing a particular duty or revenue to the crown," therefore it cannot be a plea against the *statutory* jurisdiction of the ordinary. "The judgment must be, that the prohibition stand as to proceeding only for the plaintiff's being married at an uncanonical hour (*i. e.*) not between the hours of 8 and 12 in the forenoon, that circumstance having been, as far as appears to us, introduced by the canons of 1603, and that a consultation⁶³ be awarded as to the residue of the cause."

It is necessary now to turn to the advent of the second Latin strain. With the accession of Elizabeth in 1558, the settlement of Henry VIII and Edward VI was restored in all its main features by the Acts of Supremacy and Uniformity. Owing to the return of the Marian exiles, however, the ecclesiastical settlement—or the Church of England by law established—soon lay open to an attack on two flanks, both Latin in conception and outlook although one was Reformed and the other was Roman. To the Roman canonist must be added the Latin Calvinist, for, ultimately, the ecclesiastical concept of Calvin differs from that of his brother in Rome not in the matter of the papacy, which is in reality incidental, but in the selection he made of "the spiritual." In Pseudo-Isidore and the Gregorians, "the spiritual" was identified with the *sacerdotium* of which the Pope was the head; in Calvin and his followers, it is the predestined elect, in general, and the presbytery in particular. In reality, Calvin marks an appeal from the imperialism of the papal court to the law of the Roman republic, and the *Institutio*

63 A *Consultation* is "a writ in the nature of a *procedendo*, whereby a cause, having been removed by prohibition from the Ecclesiastical Court to the King's Court, is returned thither again; for if the judges of the King's Court, upon comparing the Libel with the suggestion of the party, find the suggestion false or not proved, and therefore the cause to be wrongfully removed from the Ecclesiastical Court, then upon this consultation or deliberation they decree it to be returned, whereupon the writ in this case obtained is called a consultation." *Wharton's Law Lexicon* (14th ed. 1938), 243.

Christianae Religionis in four books bears the stamp, both of form and of language, of his debt to Justianian's *Institutes*. It is significant that Hooker opens his attack on the Latin conception of the separation of Church and State on the flank of Cartwright and that the canonist view naturally falls into its proper place in the arguments.⁶⁴

What was implicit in the Presbyterian system was rather the freedom of the Church to dictate the course of the state, just as the ecclesiastic under the Pseudo-Isidorian *régime* had found the claims and practice of Innocent III or Boniface VIII to be the realization of the superiority of the spiritual over the temporal. It was this element which accounts for the recalcitrance of James I. The other element, which owed more to the Anabaptist than to Geneva—the Brownist—was politically less dangerous, for it acknowledged no authority of the state whatsoever. As Hooker sums up their position

Their judgment is therefore that the Church of Christ should admit no law-makers but the evangelists, (no courts but presbyteries, no punishments but ecclesiastical censures.)⁶⁵

They were at one with the Calvinists in demanding the liberty of the Church, but divided from them on their belief that the State had no part in affairs ecclesiastical, not even the subordinate rôle of *instrumentum ecclesiae*. The two elements, united in their opposition to episcopal rule and state control, remained united until Cromwell disposed of the Presbyterian claim to establish a national church. The reign of Elizabeth marks the beginning of the alliance, which the policy of uniformity only cemented.

It is unnecessary here to survey the whole of the ecclesiastical legislation of Elizabeth's reign, but notice must be taken of her administration of the Church. While she resented any interference from the House of Commons in ecclesiastical mat-

64 *Hooker's Ecclesiastical Polity Book, VIII*, with an introduction by R. A. Houk (New York, 1931), 68-70, 73-76, 80, 153-167; Calvin's view of the relations of Church and State, v. J. Mackinnon, *Calvin and the Reformation* (London, 1936), 251-261, 265-270. The reference to Calvin's debt to Civil Law recalls a remark made by Figgis: "What I have tried to show is that this error is not of modern origin, that it did not come into our world at the Renaissance, though it may have been accentuated then, but that it is part of the *damnosa hereditas* from the Civil Law of the Roman Empire, of which Stubbs once said that, whenever it had been dominant, it destroyed any real idea of civil and religious freedom." *Churches in the Modern State*, 226.

65 Houk, *Hooker's Polity*, 63; cf. 235-6.

ters, she made it equally clear that she would tolerate no dictation from the clergy. She ruled the Church by means of Advertisements, enforced by the Court of High Commission and even Coke, in referring to Cawdrey's Case (1591), recognized that

as in temporal causes the King by the mouth of the Judges in his Courts of Justice doth judge and determine the same by the temporal laws of England so in causes ecclesiastical and spiritual, as namely blasphemy, apostasy from Christianity, heresies, schisms [etc.] (the conusance whereof belong not to the Common Laws of England) the same are to be determined and decided by ecclesiastical judges, according to the King's Ecclesiastical Laws of this realm.⁶⁶

This opinion follows a statement, recalling the preambles of Henry VIII's statutes, that

by the ancient laws of this realm this kingdom of England is an absolute empire and monarchy consisting of one head, which is the King, and of a body politic compact and compounded of many and almost infinite several and yet well agreeing members; all which the Law divideth into two general parts, that is to say, the Clergy and the Laity, both of them, next and immediately under God, subject to and obedient unto the head.

The importance of these passages lies in the clarity with which "the King's Ecclesiastical Laws" have superseded the canon law. Elizabeth refused to appoint the commission to revise the canon law, or to give her assent to the Canons of 1571. Instead, the Act enforcing subscription to the Thirty Nine Articles was passed by Parliament in 1571, and received the royal assent.⁶⁷

In the critical years which followed the defeat of the Armada, while the situation created by the Marprelate controversy was still acute, Richard Hooker wrote the Eighth Book of *The Ecclesiastical Polity*, in which he set out the idea of the Established Church of England and the conception of a national Church realized in terms of a national anointed King. It is the same view as that later worked out by J. N. Figgis under the title *Respublica Christiana* with, perhaps, a stronger emphasis on the rôle of the King as the Lord's anointed. Hooker's appeal is based on the status of the Jewish King, to David and Solomon, who were the Lord's anointed kings—Messiahs—of the Jews, and although he is careful (quoting Tertullian)

⁶⁶ J. R. Tanner, *Documents*, 373.

⁶⁷ E. Cardwell, *The Reformation*, xii; G. F. Maclear and W. W. Williams, *An Introduction to the Articles of the Church of England* (London, 1909) 21-22.

to differentiate the supremacy of the king from the supremacy of Christ, he successfully avoids the canonist's differentiation, "*istis non competit iste primatus*," by which the king and civil governor was deprived of his jurisdiction over his clerical subjects.⁶⁸ Furthermore, the argument of Hooker is not confined to a monarchical commonwealth. It is Aristotelian to the core and, as he points out explicitly, applies equally to a republic.⁶⁹ It is difficult indeed to reconcile the *Report* of 1935 with the position set forth by Hooker in 1593.

The reason is to be found in the development of the Anglo-canonical strain under the influence of Bancroft, whose stress falls in the divine right of the bishop by virtue of his place in apostolic succession. In the Tudor *régime* there was room for but one divine right—Her Majesty's, and Hooker's account of the episcopate may verge on the utilitarian, but he is thereby saved from the narrow use of the word Church, whereby the laity are excluded from all but a servile status—the identification of Church with *sacerdotium merum*. The party led by Bancroft, however, was the lineal successor of the party which had resisted Henry VIII's terms of the *Submission of the Clergy*.

No sooner had Bancroft suggested that bishops might be held to possess authority not altogether derived from the Queen than it was pointed out by Sir Francis Knollys that to say "that the superiority of Bishops is God's own institution . . . doth impugn Her Majesty's supreme government directly." . . . It would be well, he wrote to Burghley in 1589, that the bishops should be made to acknowledge in some further manner, that they possessed no authority "but such as is to be derived unto them directly from Her Majesty's supreme authority and government." He pointed out that if the authority of the bishops were *jure divino*, it was meaningless to say that they held it from the Queen, since in that case the Queen would only have conferred what she could not have withheld. If, in fact, bishops derive authority direct from Christ and the Apostles, then the Queen is not "the only supreme governor of this realm . . . in all spiritual or ecclesiastical things or causes."⁷⁰

The discussion is a symptom of the change in apologetic, hitherto against Calvinism, against which Bancroft was really fighting, to the assertion of validity of Anglican sacraments against Roman attacks, which is the distinguishing feature of the next half century. The Tractarians simply raised anti-Roman apologetic to the rank of Anglican dogma, and so trans-

68 Hooker, VIII, (Ed. Houk), 187-206.

69 *Ibid.*, cf. 158, 176, 177.

70 J. W. Allen, *A History of Political Thought in the Sixteenth Century* (London, 1928), 182.

mitted the heritage of Pseudo-Isidore and the Forged Decretals to the Anglican Church. That is the real significance of the appeal to "the Caroline Divines."

In passing from the Tudor period to the reigns of James I and Charles I, together with the "Caroline Divines," ecclesiastical affairs take their place in the general struggle of the claims of Parliament against the encroachments of the royal prerogative and the King in Council. James I supported the claims of the bishops against the Presbyterians on the basis of his maxim, "No bishop, no king," a position utilized by Bancroft to promote his own ends. The opportunity was taken, therefore, to utilize the royal supremacy for the purpose of establishing an Anglican canon law in the Canons of 1603. In any assessment of the claims of the Church, as represented in the Convocations, the position of foreign policy and taxation are pertinent. James claimed that foreign policy was a royal mystery not subject to the review of Parliament. A similar view governed his attitude towards the Church and, for that matter, taxation. It was therefore inevitable that the Church should pay the penalty not only of its maintenance of its catholic heritage of an episcopate and *sacerdotium* acting *jure divino*, but also of its subordination of that rôle to the interests of royal absolutism in order to gain the liberty of the *sacerdotium* from the lay supervision of Parliament, and it paid the penalty. The position is most strikingly illustrated by Laud. Laud appears to differ from Bancroft in laying the stress rather on the royal *jus divinum*, and so approximates a rigid Anglican rather than a confessed Anglo-Catholic and he is the forerunner rather of Sancroft than of Newman.⁷¹ The attempt to impose the Book of Common Prayer on Scotland was so closely tied up with Charles I's period of absolutism that his failure precipitated the whole issue of taxation without representation, the control of the army and the question of billeting, together with the abolition of the Court of High Commission, whereby the secular sting was removed from excommunication. The argument for "the liberty of the Church" in matters ecclesiastical, based on an appeal to the Caroline divines is as alien to the nature of the Establishment and the constitution of the Anglican Church as would be an appeal on the part of the Treasury to the apologists of "Ship money" for the removal of taxation from the control of Parliament on the ground

71 Cf. E. R. Adair, "Laud and the Church of England," *Church History* V (1936), 129, 131f.

that the Crown had never consented to the surrender of its right to tax save under external pressure. Still closer are the parallels of the protection of the liberties of the laity by the control of the East India Company and the later device of the Army Act.

All doubt as to the status of the Anglican Church and the nature of the Establishment is laid at rest by the Act of Uniformity of 1662. There the procedure is clearly set out. First, the King granted his commission under the Great Seal of England to several bishops and other divines to review the Book of Common Prayer and to prepare such alterations and additions as they thought fit to offer; "afterwards the Convocations of Canterbury and York being by his Majesty called and assembled . . ." reviewed the said Book; "all of which his Majesty having fully approved and allowed the same and recommended to this present Parliament. . . ."⁷²

III. The situation created by the Act of Uniformity in 1662—of statutory sanction by the representatives of the laity and clergy in Parliament in confirmation of the Book of Common Prayer, proposed and passed by the representatives of the Clergy in Convocation—has governed the Church of England and defined the Establishment ever since. The Canons of 1603 were not confirmed, and therefore their legal position, though subsequently defined by Lord Hardwicke for the laity, still remains equivocal, even for the clergy; the Canons of 1640 were ignored.

In the years that followed, the Anglican Church was forced to look to the protection of Parliament against the Roman Catholic aggression sponsored by the crown in the form of Declarations of Indulgence, and having initially looked askance at dissenters from the Act of Uniformity, it was forced ultimately to utilize their support in defence of its ecclesiastical integrity. With *The Bill of Rights* (1689) and the *Act of Settlement* (1700), the change that comes over the form of the kingship modifies the position of the Church, of which the King is not only by law bound to be a communicant member but also is by statute declared to be its supreme head on earth. The Church is protected from the King's assumption and exercise of "a power of dispensing with and suspending of laws, and the execution of laws, without the consent of Parliament"; from

72 14 C. 2. cap. 4. (Gee and Hardy, *Documents*, 601-2).

a repetition of the acts which led to the trial of the seven bishops; and from the erection of "a court called the Court of Commissioners for Ecclesiastical Causes" under the Great Seal. The change from the doctrine of the divine right of kings to the theory of a Parliamentary title was bound to carry with it a corresponding Parliamentary view of the Establishment so that the growth of Parliamentary control over the King's ministers of State was accompanied by a similar measure of control over the King's ecclesiastical ministers. The main difference appears in the fact that while on the subject of the Church the King and the Parliaments were generally on the same side, on the subject of the ministers of State, they were divided. After 1688, moreover, the non-juring schism tended to weaken the party that supported the royal supremacy, and the issue of the liberty of the Church is fought out between the episcopate, as represented by Gibson, and the lawyers, as represented by Hardwicke.⁷³ Furthermore, there is the tendency in Parliament to regard the Established Church as a chartered company but slightly senior to the East India Company, and there emerged again the jealousy of the House of Commons for control over an over-mighty corporation. In the period that elapses between the Revolution of 1688 and the First Reform Act of 1832, therefore, the struggle for Parliamentary control over the executive in secular affairs, which led to the evolution of the Cabinet, carried with it an implied struggle for control over the ecclesiastical executive for which Laud's policy was ultimately responsible. In the process, the royal supremacy and patronage became dependent upon political rather than theological orthodoxy.

The problem was further simplified by the closing of Convocation from 1717 to 1852. The financial importance of Convocation vanished with the surrender of the right to vote taxes as separate houses in 1664. Henceforth its record was not a happy one. The feud between the upper and lower houses reduced their sessions to unseemly wrangles, in which ecclesiastical statesmanship was conspicuous by its absence. After 1688, the lower houses tended to represent the submerged Stuart royalist element against the episcopal acceptance of the Revolution. The *sacerdotium* had never accepted the *Act of Toleration* with a good grace. The support of the Dissenters had saved

73 Norman Sykes, *Edmund Gibson* (London), 144-173.

the Anglican Church from the policy of James II, and their support had been asked on the basis of a legal toleration in place of an illegal Declaration of Indulgence. The Act was unpopular with the Clergy but the bishops as a whole saw that it must be accepted.⁷⁴ The leader in the movement for greater toleration (and possibly comprehension) was Hoadley, who is the Whig counterpart of the Tory Sacheverell. The outburst of indignation known as the *Bangor Controversy* made the silencing of Convocation an imperative necessity for the State. Nor can the Government be seriously blamed, for Convocation appeared to have outlived its usefulness, and its main care appeared to be the maintenance of the privileges of the lower house against the upper house. The plea that but for the closing of Convocation, the Church of England might have adjusted itself to the changing distribution of English population, to which the Methodist movement addressed itself, finds little foundation in its chronicle in the years 1660 to 1717.⁷⁵

In the meantime there were developing two ecclesiastical alignments in the episcopate. On Whig and low church side, conversations were opened with a view to union with the Gallican, Moravian, and other continental Churches. This movement was by no means satisfactory to all Whig clergy; for instance, Edmund Gibson looked askance at the movement. He had far more in common with the other side for he held the libertarian view of the Church, and enunciated it in the preface to the *Codex*.⁷⁶ On the non-juring side a parallel tendency appears in their leaning towards the Roman Catholic and Greek Orthodox Churches. While the Latitudinarians, therefore, were striving to find in the Act of Toleration the foundation for a new comprehensive Church of England on the basis of the principles of the Reformation, another party

74 *v. Church and State, 1935*, 13, 15-17, for a modern statement of the "Act of Toleration" in terms of disadvantage to the Church. Gwatkin points out the attempts of the Tories to take the virtue out of the Act (*Church and State to the Death of Queen Anne*, 378f., 385f., 390; *Cambridge Modern History*, V, 336f.). H. Hensley Henson, *Anglicanism* (London, 1921), 97. Even Catholic Emancipation was a stumbling block; H. L. Stewart, *A Century of Anglo-Catholicism* (New York, 1929), 83. The best criticism yet written on the Report is by Professor Norman Sykes: "The fundamental weakness of the Report lies precisely in the lack of any evidence of appreciation of the responsibility and duty of the Church of England towards the Nation." *The Church and the Twentieth Century* (London, 1936), 45.

75 Norman Sykes, *The Church of England in the Eighteenth Century* (Cambridge, 1933), 310ff.

76 F. W. Maitland, *Canon Law in the Church of England*, 81-83, 97; N. Sykes, *Edmund Gibson*, 68-71.

was growing up which tended to harden ecclesiastical opinion in the direction of Catholic orthodoxy and Catholic order, the revival of continental canon law and the acceptance of a continental rather than national basis of Churchmanship.

These factors crystallized in the period between the death of Prince Charles Edward (1788), which released the non-juror's allegiance, and the First Reform Act (1832), which made the Church subject to the control of a legislature no longer theoretically Anglican in its membership. Furthermore, the bishops' opposition to the Reform Bill in 1831 had appeared to be the decisive factor in its defeat. Even *The Times* stated, "The Bishops have crushed our liberties. But for them we should have a free Parliament, and the downfall of an oppressive oligarchy." The Prime Minister—Lord Grey, a Whig—thereupon told the Bishops to "set their houses in order." He did not finish the quotation.⁷⁷ The High Court of Delegates, the supreme court of appeal in *rebus ecclesiasticis*, was abolished without official consent of the clergy, and its functions were transferred to the Judicial Committee of the Privy Council (1832).⁷⁸ In the following year appeared the Bill for the Disestablishment of the Irish Church, which produced Keble's Assize Sermon on "National Apostasy" and rallied the Pseudo-Isidorian forces of the Church.

The parallel of the Irish situation in the United Kingdom with the Breton situation a millenium earlier in the Frankish realm is too striking to be passed over without notice. It was the Breton king's demand for an independent provincial see at Dol which produced the Forged Decretals and they, in turn, as we have seen already, are the foundation of all subsequent editions of the *Corpus Canonum* or body of Canon Law; it was the parallel threat of the Disestablishment of the Irish Church which produced the *Tracts for the Times*. The argument of Tract I, moreover, is identical, *vis-à-vis*, with the underlying argument of the Forged Decretals, viz.: that inasmuch as it is impossible for "the Church" to hope for justice from the State, the Church must look to its own freedom of action based on its own *jus divinum*. In the case of Pseudo-Isidore, the argument is directed against the *spoliatores ecclesiae*. The same argument is implicit in the *Tract*, but it is expressed in terms of the Establishment.

77 v. Y. Brilioth, *The Anglican Revival* (London, 1933), 96-97.

78 v. *supra* n. 46.

Should the Government and Country so far forget their God as to cast off the Church, to deprive it of its temporal honours and substance, on what will you rest the claim of respect and attention which you make upon your flocks? . . . and the question recurs, on *what* are we to rest our authority when the State deserts us?

The argument is developed in Tract II ("The Catholic Church") and with still greater point in the Fifty-ninth, entitled "Church and State." It was this argument that lay at the heart of the Tractarian Movement, which was the ecclesiastical counter-part of the American Declaration of Independence of the Hanoverian State. The later ritualistic development is the logical sequel and it derives from Cambridge in the Camden Society's work. The appeal to mediaeval tradition—always confined to the Gregorian era of English Churchmanship—led to the revival of the forms of service and ecclesiastical vestments characteristic of that era, and the Sarum Use—a Norman French product—becomes the normal English service. With certain exceptions, the English Church in the eighteenth century had moved away from both the theory and the practices which now reappeared, so that the mediaeval revival was regarded as a Romanizing element within the Church, and provoked the antagonism of the authorities. The Ritual prosecutions were the result.

It would take too long to give in any detail the substance of the series of cases to which this dispute gave rise, nor would it serve any useful purpose. The judgments of the courts were met by the passive resistance of the clergy of the new school, aided by the fear of the episcopate to enforce the law, lest a wholesale secession to Rome should ensue. On the other flank, the Broad Church School, under the leadership and protection of Bishop Thirlwall, was taking its stand for the establishment and the recognition of the new German scholarship on the Bible and the documents of church history. The revival of Convocation, followed some fifteen years later by the summoning of the Lambeth Conference, gave rise to the hope that the voice of the Anglican Church would serve to allay the strife and to the fear that it would merely provide a platform for the clerical claims of the new party. The attitude of the Queen was definitely on the side of the Protestant view and antagonistic to the new Oxford school. The expanding episcopate gave rise to the question of the nature of Parliamentary control and the jurisdiction of the royal courts over the new colonial churches. The Colenso case produced a schism in South Africa and its con-

sequences continue to the present time to be a source of irritation.

The chaos created by these developments in the Established Church led to the appointment of a series of commissions, of which the most important were the Royal Commission on Ecclesiastical Courts (1883); the Royal Commission to inquire into the alleged prevalence of breaches or neglect of the law relating to the conduct of Divine Service in the Church of England . . . (1904); the Royal Commission on Matrimonial Causes, which reported in 1912; and the Archbishops' Commission on Church and State (1915). These four Commissions and their reports form the starting point of the last phase of the controversy and the foundation of the present situation.

The results of the first Commission were embodied in a report which is a monument of learning and scholarship, for which the late Bishop Stubbs was mainly responsible. Its fundamental view was that the Church of England had always possessed and exercised the right of selection in regard to the canon law of the West, and that its canon law, therefore, was its own. This view was attacked, and finally demolished, by the late Professor F. W. Maitland in a series of essays subsequently collected and published under the title of *Canon Law in the Church of England*. In that work, Maitland showed conclusively that the English Church, before the Reformation accepted the whole of the canon law of Christendom, and that the only limit that was imposed came from the side of the State—Parliament, the Law Courts, and the common lawyers, and that the parliamentary course at the Reformation was already marked out by the pre-Reformation kings and Parliaments. Maitland's work laid the foundation of the Cambridge School in opposition to the Oxford Movement. Stubbs' position in the Report, however, marks the completion of the work of Keble and Newman and the ecclesiastic has generally tended to follow the Bishop rather than the agnostic historian of English law.

The second Commission led to the issue of the King's "Letter of Business" on the 10th of November, 1906, authorizing the Archbishop of Canterbury to proceed with the task of revision of the Book of Common Prayer of 1662. Parliament's rejection of the proposals has been already noticed; their consequences are embodied in the Report of 1935. To the question of the validity of Parliament's action we shall return later.

The work of the third Commission on Matrimonial Causes

(1912) remained still-born until the agitation led by A. P. Herbert and crowned by his election to Parliament as Junior Burgess of the University of Oxford brought it to life and added to the ecclesiastic's indignation at the check of 1927-8, the inroad into what he regarded as his peculiar jurisdiction in 1937. Its consequences will be dealt with in the conclusion.

The result of the Archbishops' Commission on *Church and State* was the establishment by Act of Parliament in 1919 (commonly known as *The Enabling Act*) of the Church Assembly, to provide a legislative body of three Houses—the House of Bishops, the House of Clergy, and the House of Laity—to represent the whole of the Church of England and to avoid or overcome the weaknesses caused by the provincial division marked by the two Houses of Convocation of Canterbury and York, and their purely clerical character. A modified Parliamentary procedure was provided for the sanction of their routine business enactments, but Parliamentary control was not waived and any measure might become the subject of a Parliamentary debate and vote. The measure was drafted by the Church and accepted by Parliament. The terms of lay franchise, as the Bishop of Durham (Dr. H. Hensley Henson) pointed out, for the first time cut off the dissenter and nonconformist from his parochial rights and reduced the Church of England to a sectarian status. Apart from the oversight of Parliament this view is substantially true.⁷⁹

This consideration brings us back to the rejection of *The Proposed Deviations from the Book of Common Prayer of 1662* by the House of Commons in 1927 and 1928. The cry of Erastianism was raised—not by Archbishop Davidson, who admitted the right of the Commons to accept or refuse the motion. In conclusion, therefore, it is necessary to examine the place of Parliament, and particularly the House of Commons, in the affairs of the Established Church, using the attack on its action as the basis of the argument, and the Matrimonial Causes measure of 1937 as the example of its application.

First, the position of Parliament is that of a lay trustee of the English Reformation settlement. To the majority of the members of the House of Commons, the Proposed Deviations

⁷⁹ H. Hensley Henson, *Anglicanism*, 228-230. For a fuller account of succeeding events v. F. W. Buckler, "Church and State in England since the war 1919-1935," *The Episcopal Pulpit*, I 1936, 77-85.

appeared to be a violation of that settlement to the degree of a doctrinal revolution. The House therefore rejected the proposals. It could not revise them or propose any amendments. The position of both Houses in ecclesiastical affairs and proposals from either Convocation or the Church Assembly is exactly the same as the position of the House of Lords down to 1912 in the matter of money bills. It could pass or reject; it could not amend. In the case of the Prayer Book measures, the amendment would have gone little beyond the clause recognizing Reservation, but the House felt it could not trust the Bishops to enforce the limitations and the extremer section of the evangelical party saw an alien interpretation of the nature of the sacrament. In order, therefore, to dispose of the objectionable element, the House was forced to reject the whole.

Secondly, Parliament is the representative body of the three Estates of the Realm—the Nobility, the Clergy, and the Laity. Each representative in the House of Commons, in his status as a private citizen, may or may not be an Anglican; in his status as a Member of Parliament, he is the representative of his electoral constituency, both of the Anglicans and members of any other bodies. He cannot be debarred from voting on ecclesiastical issues, therefore, without disfranchising his Anglican constituents. Furthermore, the principle involved in the contention would preclude any member of Parliament from voting on any bill representing sectional interests unless he belonged personally to the section whose interest were at stake. The adoption of such a principle would involve the end of national representative government and deprive the subjects of the realm of any control over the general policy of the kingdom.

Thirdly, what is true of the individual parliamentary representative is true of Parliament as a whole. The plea that Parliament as a *secular* body has no jurisdiction over spiritual affairs, if carried to its logical conclusion, would result equally in the undoing of the whole theory of constitutional government. Within the framework of the English constitution, the King in Parliament is the supreme legislative authority, and any ecclesiastical legislature, particularly that of the Established Church, falls within the rank of subordinate legislatures. If the Church and its law, therefore, come into conflict with the interests, rights and safety of the nation or any part of the nation, it is the duty and function of Parliament to see that those interests and rights are safeguarded. Furthermore, no Parlia-

ment could be indifferent to the administration of so great a corporation, controlling so great an amount of property and wealth within its jurisdiction. Here the parallel between the claims of the Anglican Church and the claims of the East India Company or British Broadcasting Corporation holds good.

The outstanding case, in recent years, of conflict of jurisdiction has arisen in the realm of the law of marriage. The chaos into which the ecclesiastical and canonist "one cause" for divorce had reduced the marriage and divorce system of the country has been sufficiently exposed by A. P. Herbert's *Holy Deadlock*, which is in reality a legal treatise. The Act of 1857 left the Church in the position that any clergyman must marry any person permitted by the state to marry, and a divorce obtained under the Act removed the impediment of the prior marriage. (Before 1857, "divorce was possible only through an Act of Parliament dealing with a particular case.") As long as the cause was confined to the single cause of adultery, opposition for the most part was not prominent.⁸⁰ In 1937, however, a bill was introduced by A. P. Herbert to carry into legislative effect the proposals of the report of 1912. It passed both Houses and received the royal assent just before the House rose for its summer vacation that year.⁸¹ This Act has raised the second great ecclesiastical crisis in a decade. The Act of 1937 contained the "relief" clause for the clergy of England and Wales:

No clergyman of the Church of England or of the Church in Wales shall be compelled to solemnize the marriage of any person whose former marriage has been dissolved on any ground and whose former husband or wife is still living or to permit the marriage of any such person to be solemnized in the Church or Chapel of which he is the minister.⁸²

This was the sop to the ecclesiastical Cerberus to disarm a complete clerical opposition, which might have jeopardized the passing of the bill into law. It was also a relief to tender consciences—a species of Declaration of Breda. The effect,

80 *The Church and Marriage*, 1935, 24. The sectarian character of this document is revealed by the paragraph "The Church and its *own* members" (*italics mine*) 17f., and the appeal to Canon Law, which precedes it. For a sketch of English opinion on divorce by a lawyer, v. S. B. Kitchin, *A History of Divorce* (London, 1912), 171-208; for the Pre-Reformation position, 59-88. This may be the proper place to point out that, *mutatis mutandis*, Mr. A. P. Herbert's *Holy Deadlock* is the masculine counterpart of Mt. V. 32, which appears to be, likewise, a *reductio ad absurdum* of the "one cause."

81 *The Matrimonial Causes Act*, 1937 [1 Edw. 8 & 1 Geo. 6. C. H. 57.]

82 *Ibid.*, sec. 12.

however, on the relations of Church and State has been disastrous. The extreme flank, led by the Bishops of St. Albans and Ely,⁸³ set forth proposals which would have resulted in *de facto*, if not *de jure*, lesser excommunication of any party to a divorce who married during the lifetime of the other party. The real issue at stake both in the Reformation and in consequent Establishment was that the clergy should obey the laws of the Realm, as Bishop Barnes had reminded the Convocation of Canterbury in connection with the sacramental controversy. The king, whether in Council or in Parliament or in Banco, is "over all persons and causes supreme," *i. e.*, over clergy and laity alike. Canon law had forbidden divorce for more than one cause and had forbidden re-marriage of one party, during the lifetime of the other, but in turn, canon law had been banned in England in favour of common and statute law. After protracted discussions in Convocation and the Church Assembly, on November 19th, 1937, the Archbishop of Canterbury, speaking in reply to a motion of the Lord Hugh Cecil that the Assembly should ask "for a Measure to prohibit the use of the Marriage Service in respect to the marriage of a person whose spouse by a former marriage is still alive," proceeded to say,

he thought it would be better to leave the few clergy who desired to continue to celebrate these marriages in their somewhat unenviable isolation; those who had recourse to them knew that their churches were marked by such marriages being held in them, which suggested that there was something irregular in those marriages. It would be better to rely on the Church's own inherent spiritual teaching and authority, and trust to its influence, than to ask for the coercive authority of the State through Parliament. They must rest their case on the Marriage Service itself. No serious proposal had been made to alter the terms of the Marriage Service or the teaching of the Church of England contained in that service. It was reinforced recently by the decision of all four Houses of Convocation. That showed very real authority. It was the voice of the Church (*N. B.*, in the Pseudo-Isidorian and un-English sense of *sacerdotium* in opposition to the Laity and State) speaking about the use and conduct of its own service. The new Act would inevitably increase, in a most complicated way, the number of divorces throughout the country. They must deal with situations as they confronted them under their responsibilities at the present time. Convocation asked that the Church (? in what sense?) should be left free to forbid the celebration of such remarriages in its own churches. Parliament, in Clause 12 of the new Act, had left the Church free.

Parliament was most unlikely to agree to any such Measure as had been

83 Drs. Furse and Hayward.

suggested. He thought Parliament felt it had made a great concession to the Church and would be unwilling to do more. If the Measure were rejected, such clergy as desired to set aside the expressed wish of the Church would be very greatly encouraged. It might involve a most painful clash between the Church (? *sacerdotium*) and Parliament. Let them base their position on the main principle that it was for the Church in the last resort, and not Parliament, to lay down regulations for the use of its own service in its own churches.⁸⁴

This summary of the Primate's speech is taken from *The Times* report and can therefore be regarded as a fair account of his utterance. The claim it sets forth renders nugatory *The Submission of the Clergy*—the sixteenth century Parliamentarians and officers of the crown did not use the word "Church" as synonymous with clergy, as did the Primate—and the implication gains in significance as the Assembly also discussed a measure for the abolition of the penalties of *Praemunire*—the fortification of the Crown and Laity beforehand against excommunication by the *sacerdotium*—which *The Times* omitted from its report. It was reserved for the *Chicago Daily Tribune* to give contemporary and immediate repair to this—obviously intentional—*suppressio veri*! Furthermore, the validity of the Primate's acrimonious attack on those who were "in their somewhat unenviable isolation" can be judged from the Bishop of Truro's plea for postponement of the decision on the ground that "they were not dealing only with eccentrics. There were others whose liberty would be curtailed." The declaration was both as illegal and unconstitutional as it was full of misrepresentation of the *Anglican* party's position, and the Archbishop appears to have been using his undoubted prestige as a lawyer in order to defeat the ends of Law and of the Established Order over which he has been called to preside, namely, that in any issue between the common and statute law of the Realm, on the one hand, and Canon Law, on the other, the law of the

84 "*The Times*" (London, November 20, 1937). Contrast with the views expressed by Archbishop Lang the late Professor J. M. Creed's review of the Report on *Church and State, 1935*, *J. T. S.*, xxxvii, (1936), 302-3. As an instance of the opportunities of a "free church" to violate its own constitutional limitations with apparent impunity, owing to the impotence of the lower clergy to act in face of probable penalization, I might quote the action of the House of Bishops in the Church of England in Canada. I have been credibly informed by a layman that the House resolved that the marriage of a party to divorce proceedings during the lifetime of the other party, should not be permitted to be celebrated in an Anglican Church, or by an Anglican clergyman. The Lower House was not consulted. A more flagrant instance of hyper-Pseudo-Isidorian episcopocratic usurpation it is hard to find outside the annals of Rome or Laudian England.

Realm shall prevail. In so doing, he has also strengthened the suspicion that the "Church's" claim for its liberty, as set out in *The Report* of 1935, bears in reality no relation to the Anglican conception of a Church in which the *sacerdotium* and the laity have their joint and respective rights and privileges, but that it is merely the recrudescence of the Cyprianic and Pseudo-Isidorian limitation of the exclusive application of the word "Church" to the *sacerdotium*. That conception may be "Catholic," Roman, or even Presbyterian, but it is not Anglican.

Indeed, the best conclusion to this essay and perhaps the best reply to *The Report* of 1935, together with the subsequent pretensions and utterances of high ecclesiastical authority based upon *The Report* is to be found in "The Churches Cause Espoused" by John Wise, who wrote against the similar Presbyterian pretensions of the Mathers and their clique in Massachusetts, published in a small book bearing the unassuming title of "Questions and Proposals" in 1705. John Wise published his reply in 1710, and the core of his argument is contained in the following extract:⁸⁵

There is something in it, which *Smells very strong of the Infallible Chair*, to Assume the Power of making Rules, to Ingress all Principles of Process, the Right of Election, the last Appeal, the Negative Vote, and all Superintending Power in Matters Ecclesiastick, as the Prerogatives of Clergymen distinct from all other Estates, and Ministers in Government; or thus, for the Clergy to Monopolize both the Legislative and Executive part of Canon Law, is but a few steps from the Chair of Universal Pestilence, and by the Ladder here set up, *Clergymen* may, if they please, Clamber thus high; for when they are invested with what is in these Proposals provided and intended for them, who then controul them, but the Almighty himself? as was said of those daring men, *Gen. 11. 6*. And now nothing will be Restrained from them, which they have imagined to do; for who can now withhold from them Infallibility, or stop the direful and definitive Sentence? Who can limit their Power, or shorten their Arm in their Executions? Their Bulls can now upon any front Bellow and Thunder out a thousand terrible Curses; & the poor and affrighted & Invassl'd Layety, both Princes & Subjects (being here as in the grave, put under one and the same Topick) must forfeit their Salvation, if they don't tamely submit, & obediently become their Executioners; for that it is now evident, that all Power is, if not really given, yet formally stollen, and in intent Bequeathed to them.

⁸⁵ Quoted from Charles Angoff, *A Literary History of the American People* (New York, 1935), I, 320-1.

PATRIARCH NIKON AND THE SUBJECTION OF THE RUSSIAN CHURCH TO THE STATE

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Patriarch Nikon is undoubtedly one of the most important figures in Russian church history. A zealous, although needlessly harsh and domineering, reformer of the church, forceful to the point of being dictatorial in the exercise of his patriarchal office, his endeavor to make the church independent of the state precipitated a struggle which in the days of Peter the Great culminated in the abolition of the patriarchate and the subjugation of the church.

Nikon, whose baptismal name was Nikita, was born in 1605¹ in the village of Veldemanovo, in the province of Nizhni Novgorod, of peasant parents. He showed great ability in school. At the age of twelve he ran away from home to escape the ill-treatment of his step-mother, and entered the Makariev Monastery of Zheltovody. But later his parents persuaded him to leave the monastery and to marry. When twenty years of age, he became a priest of the village of Kolychevo, but two years later his abilities procured for him a call to a parish in Moscow. Within ten years, in 1634, when his three children had died, he persuaded his wife to become a nun, and he himself retired to a hermitage at Anzer on the White Sea.

He became a monk, and at this time changed his name to Nikon. Later, probably toward the end of 1641², he removed to the monastery of Kozhezero, located in the midst of extensive tundras, fifty *vershs* from the nearest inhabited place. Nikon lived there as a hermit. About eighteen months later, contrary to his wish, he was chosen hegumenos of the monastery. He proved an excellent administrator. In 1646, when on some monastery business at Moscow, he met the leader of the church reforming party, Archpriest Stephen Vonifatiev, confessor of

1 P. Znamensky, *Rukovodstvo k russkoi tserkovnoi istorii* (Kazan, 1888), 196.

2 Pierre Pascal, *Arvakum et les débuts du Raskol* (Paris, 1938), 123. The chronology of Nikon's life at this point is in some doubt.

the Tsar, and through him the youthful Tsar Alexis Mikhailovich, who had ascended the throne the year before at the age of sixteen. The Tsar was deeply impressed by Nikon's forceful personality and secured him the appointment as the archimandrite of the Novospassky monastery in Moscow.³ Since this monastery was located in the immediate vicinity of the Kremlin, Nikon became the Tsar's spiritual advisor and his inseparable companion. He was soon given the charge of petitions from widows and orphans, an office which later developed into a separate department of the tsarist administration.

Nikon also became a zealous member of the reform party led by Stephen Vonifatiev. Among other reform projects, this party gave much attention to the publication of books. It had established a printing press in Moscow, and members of the group wrote or edited liturgical texts and edifying religious literature, mostly for the use of priests.

They aimed at "the intellectualization of religion by the aid of books from the South and the West."⁴ The southern influence emanated from Kiev, which at the time was not within the Muscovite dominion (although it was soon to be included), but was part of the great Polish-Lithuanian realm. As such, it was exposed to strong Uniate and Roman Catholic, as well as Greek, influences. All were looked upon with suspicion in Russia proper, for even the Greeks were generally regarded as "betrayers of Orthodoxy" because of their acceptance of the Union of Florence in 1439. The western influences were, of course, even more energetically repudiated. Thus there existed a latent danger that the Kievan cultural influence might contaminate the strictly Orthodox native piety. On the other hand, since the Muscovite dominions could boast of but feeble independent cultural activity, the reforming party, anxious to raise the low level of the intellectual life of the country, particularly of the priesthood, found itself perforce leaning upon the Kievan cultural aid. The decisive rôle in this movement was played by a young nobleman, Rtishchev, but the Archimandrite Nikon and the Archpriest Stephen exercised no mean influence upon it. The texts published were edited mostly by Kievan scholars, adherents of the Little Russian School, but they were carefully supervised with the view to preventing any prejudice to native

3 The date is not definitely known, but the last document at Kozhezero bearing Nikon's signature is dated on February 3, 1646. *Ibid.*, 123.

4 *Ibid.*, 132.

(i. e., Great Russian) Orthodoxy. At any rate, this phase of the reform was regarded as emanating from the native, i. e., Russian, Church Slavonic, not from Greek sources; it was this feature which made the reform generally acceptable.

One of the most popular of the works issued by the press was *The Book of Faith, One, True, and Orthodox*, published in June, 1648. It comprised a defense of the Russian custom of rebaptising the Latins, a justification of the procession of the Spirit from the Father alone, the use of unleavened bread and the communion under two kinds, the equality of all the apostles, a defense of icons, of the worship of saints, and of prayers for the dead. Its polemical character is especially clear in the attacks against the Uniates and the Jews. The book concluded with a chapter on the imminent appearance of the Antichrist which was later utilized by the Old Believers who identified Nikon and the State Church with him.

On March 9, 1649, through the Tsar's intervention, Nikon, then forty-four years old, was appointed the Metropolitan of Novgorod, the most important see after Moscow. But each winter he returned to the capital to be near the Tsar. During a revolt which occurred in Novgorod and Pskov, Nikon rendered the government many important services, although he almost lost his life when a mob severely mishandled him. Despite this treatment, Nikon counselled the Tsar to exercise moderation in dealing with the insurgents.

During his term of office as metropolitan, Nikon showed himself a stern and harsh reformer of the prevailing abuses. He refused to ordain illiterate candidates for the priesthood, and introduced sermons into public worship. But his administration was remembered chiefly for the severe disciplinary measures to which he resorted: he put offending priests in chains, suspended many from office, and excommunicated the unworthy. These measures rendered him odious in the eyes of many whose zeal was not equal to his own.

In 1652 the pious Tsar decided to transfer the relics of the great national saints, Metropolitans Job, Hermogenes, and Philip, to the chief national shrine, the Uspensky Cathedral in the Moscow Kremlin. The last of these worthies had been put to death at the command of Alexis's grandfather, Ivan the Terrible. Metropolitan Nikon was entrusted with the task of transferring the relics of Philip from the Solovetsky monastery

in the White Sea to Moscow. While he was away, engaged in this pious task, Patriarch Joseph died (April 15, 1652). For the last three of four years of his term of office, he wielded but little power. He was not on friendly terms with the "friends of God"—the reforming group gathered about Stephen Vonifatiev—and they were able to sway the Tsar to follow their policy in preference to the patriarch's.

The reforming party now privately urged Alexis to appoint their revered leader, Archpriest Stephen, as the successor of Joseph. But Stephen belonged to the "white" clergy, in other words, did not possess the necessary qualification for the hierarchical office, that of being a monk. Moreover, he himself refused to consider the candidacy, and urged the appointment of Nikon. But his supporters were not easily rebuffed. They sent a petition to the Tsar and Tsarina, urging Stephen's appointment even against his will; among the signers were the Metropolitan Cornelius of Kazan and the Archpriest Avvakum who was destined later to become the leader of the anti-Nikonian party. But Stephen again refused the candidacy and circulated a petition of his own in favor of Nikon. Alexis's mind, for that matter, was already made up: he was determined to make Nikon patriarch. He exerted enough pressure upon the convened Sobor that it unanimously chose, out of the twelve candidates, the forty-seven year old Metropolitan of Novgorod as the successor of Joseph. Nikon had returned from the Solovetsky monastery on July 6; the election took place on July 22, 1652.

But the Tsar and the Sobor met with a surprising rebuff when they informed Nikon of the election. For the latter refused to accept the office. Finally, when brought into the cathedral by the *boyars* and the bishops, and the Tsar begged him to accept the office and even publicly prostrated himself on the ground before him,⁵ he at last yielded, but not without first exacting a solemn promise as the condition of his acceptance, that the Tsar, the *boyars*, and the episcopate promise him to observe this condition: "If it please you to choose me as your Patriarch, give me your word and make a covenant . . . that ye will keep the evangelic dogmas and the canons of the Holy Fathers and of the Apostles and the laws of the pious Emperors,⁶ and if you promise to obey me also as your chief pastor

5 Znamensky, *Rukovodstvo*, 198.

6 that is, Byzantine Emperors.

and Father in everything which I shall teach you concerning the divine dogmas and canons, then will I according to your wish accept this great Patriarchate."⁷ The Tsar, the *boyars*, and the bishops gave the promise, taking an oath on the gospels and the holy images. Thereupon, Nikon was consecrated patriarch.

Since this event is fundamental to the understanding of Nikon's policy, it is necessary to digress at this point in order to consider the chief source of Nikon's theories of the church-state relationship. As Sokolsky points out,⁸ the promise demanded by Nikon before accepting the patriarchal office is almost a literal translation of the fourth article of the second chapter of a Byzantine code known as the *Epanagoge*. This ninth century law code was, in the opinion of the editor of its first critical edition, Zachariä von Lingenthal,⁹ merely a law project, never officially published. But the Russian scholar, Sokolsky, showed conclusively that the *Epanagoge* was officially proclaimed law, and had been repeatedly so used in the Byzantine Empire, in Russia, and elsewhere.¹⁰ It has even become part of the Russian canon law.

The *Epanagoge*, the provisions of which were most likely worked out by the celebrated Patriarch Photius (858-867, 878-886),¹¹ was the first code to present detailed definitions of the relations between the state and the church, particularly as far as the respective duties and privileges of the emperor and the patriarch were concerned. Jesus Christ is acknowledged as the supreme ruler over both the state and the church: but He exercises jurisdiction through two regents—the emperor and the patriarch. "Both regents form one whole, as the state coalesces with the church into one whole. The state is the matter, the church the form."¹²

The emperor is supreme in the secular sphere, although his power is strictly limited in the ecclesiastical realm. He is in

7 Quoted from W. Palmer, *The Patriarch and the Tsar*, III, 383, in Hugh Y. Reyburn, *The Story of the Russian Church* (London, 1924), 143. Also in VI. Sokolsky, "O kharaktere i znachenii Epanagogi," in *Vizantiiskiy Vremennik*, I (St. Petersburg, 1894), 45. Archdeacon Paul remarks that Nikon was granted "supreme power in the appointment and disposal of ecclesiastical offices." Laura Riddings, ed., *The Travels of Macarius* (London, 1936), 36.

8 Sokolsky, "O kharaktere i znachenii Epanagogi," 45.

9 Zachariä von Lingenthal, *Collectio librorum juris graeco-romani ineditorum* (Lipsiae, 1852).

10 Sokolsky, "O kharaktere . . . Epanagogi," 17-28.

11 *Ibid.*, 34ff.

12 *Ibid.*, 29.

duty bound to protect and defend the church, and is the administrator of both the secular and the canon laws. But he must rule in accordance with Scriptural and conciliar precepts and laws as interpreted by the ecumenical councils. The interpretation of canon law and the Scriptures is the prerogative of the patriarch, not the emperor. In fact, the doctrinal position of the emperor is strictly defined.¹³

The patriarch is as necessary to the proper functioning of the state-church organism as the emperor. Both are *τὰ μέγιστα καὶ ἀναγκαιότατα μέρη τῆς πολιτείας*. As the emperor exercises authority over the body of the state, so the patriarch wields sway over its soul. Thus in a true sense, the polity of the Byzantine state, according to the *Epanagoge*, is a dyarchy, although the respective functions of the two rulers are strictly delimited. The patriarch, it is asserted,¹⁴ is the living and ensouled (*ἐμψυχος*) image of Christ, by his deeds and words expressing the truth."¹⁵ His chief task is "the salvation of the souls entrusted" to him. In this task he is charged to withstand even the emperor: "in defense of truth and the dogmas (he is) to speak fearlessly even before the face of the emperor."¹⁶

Sokolsky sums up the whole basis of the church-state relations as follows: "The supreme law-giver, judge, and ruler of the organism is the Lord Jesus Christ Himself. His regents and representatives on earth are the emperor and the patriarch. The emperor governs the secular society in accordance with laws. The emperor decrees laws and interprets them, but they must not be contrary to the canons. The emperor does not define the dogmas. On the contrary, his legislative powers are limited by the dogmas and the canons. The *Epanagoge* directly shows what the emperor is obliged to believe and confess. In relation to the church, he is its defender, the guardian of Orthodoxy and the protector of the dogmas (in the sense of their immutability). The patriarch rules the church in accordance with canons. To him exclusively belongs the right of interpreting them. He should fearlessly bear testimony to truth even before the emperor. The church-state community is ruled in common by the . . . emperor and the patriarch."¹⁷

13 Lingenthal, *Collectio*, Ch. II, art. 5.

14 *Ibid.*, Chapter III, art. 8.

15 Sokolsky, "Ο kharaktere . . . Epanagogi," 31.

16 *Ibid.*, 32.

17 *Ibid.*, 33.

More than a century after the Byzantine Empire fell, the Russian Grand Prince, John IV, was acknowledged by the Ecumenical Patriarch Joasaph, in 1561, as the lawful heir of the Byzantine emperors. Logically, according to the *Epanagoge*, the ecumenical patriarch should have become associated with the Russian tsar in the government. As a matter of fact, such an attempt was actually made by the Tsar Feodor Ivanovich in 1589, when Patriarch Jeremiah II visited Moscow. But because Jeremiah had been offered Vladimir as his see and not Moscow, and for several other reasons, the attempt failed.¹⁸ Instead, Jeremiah acknowledged the Metropolitan Job as the patriarch of the autocephalous Muscovite church.

Nikon, accordingly, introduced no innovation when he demanded, as a condition of his acceptance of the patriarchate, that the church-state relations defined in the *Epanagoge* be acknowledged. These theories were well known in Russia both in the Greek version which was found in the *Syntagma* of Matthew Vlastares (and in its partial Slavic translation), or from the beginning of the sixteenth century in a new Slavic translation which made its way throughout the Muscovite dominion. Nikon naturally regarded the work as very important, and had a book containing a large part of it twice translated. He based his entire policy in relation to the state on the provisions of the *Epanagoge*, and his guiding principles cannot be rightly understood apart from this fact.

His conditions accepted, Nikon entered upon a period of the closest co-operation with the Tsar which lasted six years. They worked, ate, and prayed together. The Patriarch was consulted by the Tsar on practically all affairs of the state, so that the Russian government resembled the dyarchy which had prevailed during the period 1619 to 1633, when Patriarch Philaret had shared the rule with his weak son, Tsar Michael Feodorovich. Like Philaret, Nikon was also addressed by the Tsar in official correspondence as the "*Veliki Gosudar*," the Great Lord, with the important difference that now the title was not borne by the Patriarch as the father of the Tsar, but merely by virtue the patriarchal office. During the Tsar's absence in the Polish Wars (1654-55),¹⁹ Nikon acted as regent

18 For the interesting and rather amusing story of the haggling over this affair see A. Ya. Shpakov, *Uchrezhdenie patriarshestva v Rossii* (Odessa, 1912), *passim*.

19 Paul, archdeacon of Aleppo, who accompanied his father, Macarius, Patriarch of Antioch, on a trip to Russia, describes the return of Alexis from this expedition as follows: "Ninety-four towns and castles had been taken by his army,

of the country, presided over the *boyars'* Duma, and had oversight of the Tsar's family. Alexis ordered that "no affair, small or great, should be determined without his advice."²⁰ Such concentration of power in Nikon's hands proved in the end his undoing: the *boyars* bitterly resented the rule of a man who was in their eyes a mere peasant upstart, and Nikon's strict and even harsh administration, in marked contrast with the indulgent and easy-going ways of Tsar Alexis Mikhailovich, was not calculated to allay their hatred. Worst of all, the Tsaritsa Maria shared the feeling of the nobles against Nikon, and her attitude in the end had a telling effect upon her husband.

The most important event during these early years of Nikon's administration was the reunion of the Ukrainian with the Muscovite church (1653). It had important consequences both for Nikon personally and for the Russian church in general. The two churches had existed separately ever since the Mongolian invasion of the Kievan Russia in the thirteenth century. The people, fleeing before the Mongol hordes, sought new settlements in north-westerly and north-easterly directions. In the end, this resulted in the creation of the Ukrainian and the Great Russian groups, governed separately both politically and ecclesiastically. Accordingly, there arose two Russian metropolitanates—the Western (Little Russian or Lithuanian) and the Eastern (Muscovite), having for their respective sees Kiev and Moscow (the latter since the first quarter of the fourteenth century). Both, to be sure, were ecclesiastically subject to the patriarchate of Constantinople. But in the middle of the fifteenth century, as a reaction to the Florentine Union of 1439, the metropolitanate of Moscow repudiated its dependence upon Constantinople, and shortly afterwards signalized its free status by electing a native Russian bishop as metropolitan of Moscow. After this, the Russians looked upon the Greeks as "betrayers of Orthodoxy," and after the fall of Constantinople and its domination by the infidel Turks regarded Moscow as "the third Rome," i. e., the head of Orthodox Christendom. This growth of ecclesiastical importance on the part of Muscovy

which showed its zeal for the Orthodox Church by slaughtering Jews, Armenians, and Poles, and throwing their children, packed in barrels, into the Dnieper, 'for nothing could exceed the hatred borne by the Muscovites to all classes of heretics and infidels.' They led away into captivity a hundred thousand enemies, seven or eight boys and girls being sold in Moscow for a dinar (about ten shillings value) or less." Ridding, *The Travels of Macarius*, 28.

²⁰ *Ibid.*, 34.

culminated, as we have seen, in 1589, in the setting up of the Russian patriarchate. In the meantime, the Kievan metropolitanate continued in subordination to the ecclesiastical jurisdiction of Constantinople.

The age-long separation of these bodies produced cultural and other differences which could not be obliterated by a mere reunion. The resulting friction between the Great Russian and Ukrainian ecclesiastics was not without its effect upon the fortunes of Nikon. As has already been mentioned, the Ukrainian clergy, having enjoyed closer contact with Greek and Western cultures, occupied a much higher educational and cultural level than their isolated and insulated Great Russian brethren. Even prior to Nikon's term of office, the reforming party in Moscow almost of necessity had to make use of the better educated Ukrainians. Nevertheless, many Great Russians commonly regarded the Greek Orthodoxy as contaminated, and looked askance upon the Ukrainians who had received their training from these religiously unreliable sources—from the Greeks and the Roman Catholic West.

But the chief offence which is generally alleged to have led to Nikon's downfall was the reform of the corrupt text of the Church Slavonic service books, and the introduction of the Greek ritualistic usages. The reform of liturgical texts had been carried on before by the reform party even during the term of office of Patriarch Joseph. But the Josephian emendations were generally in accordance with the native usages, "re-establishing the piety of the fathers." Nikon went beyond this limit back to the Greek texts, and employed Greeks and Ukrainians in this task.²¹ He had originally shared the opinion of the other members of the reform party that the Greeks had "betrayed" Orthodoxy. But after the visit of the Jerusalemite Patriarch Paisios, who came to Russia in 1649 and made a great impression on Nikon, the latter changed his attitude toward the Greeks, and introduced some Greek usages into his metropolitanate of Novgorod. The ancient usages preserved

21 Such a book as Pierre Pascal's *Avvakum et les débuts du Raskol*, portrays the whole struggle of Nikon as caused almost exclusively by the latter's "hellenization" of the Russian church. This is the thesis of many older Russian works as well. The thesis of M. V. Zzykin, in his *Patriarkh Nikon* (Warsaw, 1931-39), that the chief cause of Nikon's deposition was his attempt to force upon the government the *Epanagoge* theory of the church-state relationship, is not given serious consideration. In fact, Pascal lists in his Bibliography only one of the three volumes of the work. Thus he does not appear to know this important work in its entirety—certainly does not show himself influenced by it.

in Muscovite Russia represented customs in general use in the patriarchate of Constantinople at the time of the Christianization of Russia. They had been preserved essentially unchanged among the Muscovites, who were characterized by an excessive reverence for antiquity, while among the Greeks they had undergone considerable changes. The differences in custom were in general non-essential. But Nikon's tactless and even ruthless substitution of the Greek for the Russian customs would have undoubtedly provoked a revulsion even among people less suspicious of the Orthodoxy of the non-Muscovites than were the Great Russians. Archdeacon Paul reported that Nikon "had given great offense to the ecclesiastical authorities by his devotion to the Greek use rather than the Russian use of church rites and ceremonies. He used to proclaim to them: 'I am a Russian, the son of a Russian, but my faith and religion are Greek.'"²²

Soon after becoming patriarch, Nikon assumed control of the publishing press which had hitherto been under the direction of the reform party. This he did in order to further his policy of hellenization. He employed for the purpose a Greek of doubtful antecedents, one Arsenius, who had come to Kiev in 1649, but had been imprisoned at the Solovetsky monastery on suspicion as to the genuineness of his Orthodoxy. Nikon now freed him, sent him to collect Greek and Latin books, and to translate them into Church Slavonic. In 1654 he even made him the head of the press. Under such auspices, the books published had been edited in accordance with the Greek texts. This resulted in the introduction of various changes in the ritualistic and liturgical usages.

The first "liturgical reform" which gave immense offense to the Muscovites was introduced seven months after Nikon had assumed the patriarchal dignity. He ordered, early in the Lent of 1653, that the sign of the cross must be made with three fingers (Greek usage signifying the Trinity), rather than in accordance with the ancient Russian custom of using only two fingers. The use of three fingers had been condemned by the Russian Stoglav Sobor of 1551. But even without such contrary legislation, the measure was certain to precipitate a storm of protest and of downright, determined opposition. It led to a rupture with Nikon's former friends.

²² *Travels of Macarius*, 37.

The leader of this opposition was not Stephen Vonifatiev, but the fiery Archpriest Avvakum.²³ Stephen was too conciliatory by nature. Avvakum wrote a protest against the innovation, which Nikon countered by persecution: he exiled Avvakum, with his wife and children, to Yakutsk—the farthest point then settled in Siberia, where along with many other prominent representatives, they suffered barbarous cruelties. Another leading member of the reform group, John Neronov, archpriest of the Kazan Cathedral, was imprisoned in a monastery.

In the face of this opposition, Nikon decided to call a Sobor to approve his reforms; it was held in March and April of 1654. It was attended by native hierarchs and other representatives of the Russian church. Nikon read to them the Acts of the Council of 1593, held in Constantinople, which had confirmed the erection of the Russian patriarchate, and which had required that the new patriarchate regulate its faith and usages in accordance with the Greek. Nikon probably quite honestly thought that he was in duty bound to carry out the provisions of this document which he interpreted to mean that all Russian usages differing from the Greek be abolished, and the Greek substituted for them. It was this document which Nikon used in justification of the changes introduced by him. As he had expected, the Sobor approved the changes, but not unanimously. The Acts are not signed by all those in attendance, and in one instance with a protest.²⁴

In 1655 another Council was held, this time attended—besides the native clergy—by such distinguished foreign prelates as Patriarch Macarius of Antioch (who spent four years in Russia, 1655-59, and during this time gave unequivocal support to Nikon's reforms), and Patriarch Gabriel of Serbia. Besides approving again the use of three fingers in crossing—a usage which Patriarch Macarius declared the only legitimate one—the Council adopted other Greek usages in preference to the native.

At the Feast of Orthodoxy in 1656, celebrated in the presence of Patriarch Macarius, Patriarch Gabriel, and Metropolitan Gregory of Nicaea, these dignitaries solemnly anathe-

²³ Avvakum's *Autobiography*, in three versions, along with his other writings, is found in *Pamyatniki istorii staroobryadchestva XVII v.* (Leningrad, 1927); there is an English translation of *The Life of the Archpriest Avvakum*, tr. by Jane Harrison (London, 1924).

²⁴ Pascal, *Avvakum*, 246.

matized the usage of two-finger crossing. This was later approved by a third council with the added confirmation of Metropolitan Gideon of Moldavia.

The opposition to Nikon's reforms is the beginning of the Schism, consummated in 1666, which has gone under the name of the Old-Ritualists' or Old-Believers' Schism. All too often this movement is represented as if it were primarily an obstinate quarrel on the part of ignorant and narrow-minded fanatics who adhered to meaningless old Russian customs out of superstitious regard for them. This is a shallow and superficial view of the matter. The leaders of the native Russian reform movement, as a matter of fact, were among the most educated of the Muscovite clergy, desirous of raising the low level of their confrères. But they were inspired by the native ideals of reform—namely, of the superiority of the native Russian, over the foreign, Greek, customs. To them, Nikon's reforms represented a betrayal of the "Moscow, the Third Rome" tradition, and a substitution of the tainted Orthodoxy of the Greeks for the genuine, sound native Orthodoxy.

Besides this very influential group of clergy opposed to Nikon's policy, there was also a large group of disreputably lax or even unworthy clergy who suffered the wrath of the Patriarch for their delinquencies. Nikon was no respecter of persons, and in his reforming zeal he was stern to the verge of savage cruelty. Archdeacon Paul reports that Nikon's armed guards "are perpetually going the rounds of the city and whenever they find any priest or monk in a state of intoxication, he is taken to prison. We saw his prisons full of them in the most wretched condition, galled with heavy chains and with logs of wood on their necks and legs."²⁵ Such severe punishment was meted out even to the higher clergy, when found delinquent. As Paul further relates, Nikon "has gone so far as to deprive the High Steward of the supreme Convent of Troitsa of his great dignity, although he ranked as the third dignitary of the kingdom, next after the Emperor and the Patriarch. He has sentenced him to be a corn-grinder in the Convent of Sievsk, the place of his banishment for the crime of taking bribes from the rich."²⁶ Such zeal may be regarded as praiseworthy, but it was sure to arouse against the Patriarch the hatred of a large and influential class.

²⁵ *The Travels of Macarius*, 36.

²⁶ *Ibid.*, 36-37.

Formerly, Nikon's reform of the service books and the introduction of the various changes in the ecclesiastical and devotional usages of the Great Russians were regarded as the chief causes of his downfall. But the more fundamental cause, as the recent researches show, was the Patriarch's defense of the independence of the church from the state—the "theory of harmony of the two spheres"—based upon the *Epanagoge*. Nikon held that the spiritual and the political powers are independent of each other. The tsar is the head of the secular government: "The tsar has the undoubted right to pass laws and regulations, but within the limits established by God. But he does not possess the spiritual right over bishops, archimandrites, and other ecclesiastical persons. Spiritual affairs are subject to the divine government—temporal to the tsar."²⁷ "The tsar," then, "is not the head or the governor of the church: where is to be found any word of Christ that the tsar has the rule over the church?"²⁸ To whom, then, has the rule of the church been given? Nikon answered this question as follows: "You have heard that it was given to the Apostles and to their successors, not to tsars; to the tsar are entrusted the affairs of this world, but to us the heavenly affairs. To the tsar are entrusted the bodies, to the clergy the souls of men."²⁹ According to Nikon, then, both governments—the temporal and the ecclesiastical—are established by God, and juridically, within their proper spheres, are independent of each other. In ecclesiastical affairs, the canon law and the patriarchal power are superior to the tsar's, while in temporal affairs the opposite is true. Obviously, Nikon only repeated, sometimes verbally, the provisions of the *Epanagoge*, and at no time went beyond them. But the difficulty of his position is found in the fact that the *Epanagoge* expressly reserved the privileges belonging to the patriarchal office to the ecumenical patriarch, not to the "local" patriarchs. Nikon, after all, ranked the last among the Eastern patriarchs. Nevertheless, he defended a church-state theory which was incorporated in the ancient Russian canon law. It was this theory which the *boyars* were determined to overthrow, for thus alone could they put Nikon "in his proper place," namely as subjected to the Tsar, and through him to themselves.

Accordingly, the real cause of the overthrow of Nikon was

27 M. V. Zyzykin, *Patriarkh Nikon* (Warsaw, 1934), II, 3.

28 *Ibid.*, 17.

29 *Ibid.*, 17.

the enmity in which the *boyars* held the Patriarch, their determination to triumph over him by making the patriarchal office subordinate to the secular government. These powerful enemies comprised the influential noble family of the Stryeshnev, relatives of the Tsar's mother; the Miloslavskis, related to the Tsar's first wife; Maria Ilinishna, his second wife; and many other members of the influential *boyar* class. They resented the strong personal hold which the Patriarch exercised over Alexis, for they sought to seize the control over the state through the Tsar themselves. They subjected the Tsar to a constant and unrelenting pressure in an effort to estrange him from the Patriarch. This whispering campaign in the end was effective: the Tsar gradually fell under the sway of the *boyars*, and thus began to draw away from the Patriarch.

A critical stage of this development was reached in 1658, on the occasion of the visit of the Georgian King, Teimuraz. Ordinarily, the Tsar's reception of such an important personage was never held without the presence of the Patriarch. This time, Nikon was not invited, and no explanation of the omission was vouchsafed. The patriarchal messenger, sent to inquire into the situation, was mistreated. Thereupon, Nikon requested an audience with the Tsar in order to seek an explanation of the treatment received: the Tsar promised to receive him, but the audience never took place. Moreover, the Tsar did not attend the church services as he had been accustomed to do in the past. It was clear to Nikon that the Tsar had broken with him. He now decided upon a radical step: he withdrew from Moscow and established himself at his favorite monastery of the Resurrection. His opponents insisted that before he left, he had renounced his patriarchal office and had invoked an anathema upon himself if he ever returned.³⁰ Nikon himself denied this version of the events, and asserted that he had withdrawn solely because of his fear of the Tsar's wrath, and had never renounced the patriarchate. Furthermore, in a letter written to the Tsar in July, 1658, he most humbly, if not abjectly, prays Alexis to "forgive him the many and great transgressions" and refers to himself as "the former Patriarch."³¹ Later, Nikon explained this reference—somewhat lamely, it must be admitted—as implying no more than the fact that the Tsar no longer treated him as the patriarch. This, of course,

30 Pascal, *Avvakum*, 298.

31 *Delo o Patriarkhe Nikone* (St. Petersburg, 1879), 1.

is the crucial problem in any attempt to appraise the events which followed. Most historians have hitherto accepted the version of Nikon's enemies, the version of the official records of the trial of 1666 (which, by the way, are not complete). But there are cogent and convincing reasons for believing that Nikon spoke the truth. Such is the fundamental thesis of the latest treatment of this question, M. V. Zyzykin's three volume work entitled *Patriarch Nikon*.

The Patriarch's absence lasted nine years. According to Nikon's opponents, he consented to the appointment of a *locum tenens*, Metropolitan Pitirim of Krutitse, and repeated his repudiation of the patriarchal office.³² Nikon denied that such was the case, although it is possible that at first he might have given color to the allegation by some hasty word. But later he uniformly held that he still retained the patriarchal office, vehemently protested against Metropolitan Pitirim's acts on the ground that on several occasions the latter usurped patriarchal functions, such as the ordination of a bishop; Nikon also strongly protested against the Tsar's interference in the ecclesiastical sphere. It was obvious that if a new patriarch were to be elected in place of Nikon without the latter's consent, the church might face a schism. And yet, Nikon refused to return to Moscow and to resume the patriarchal administration unless the Tsar changed his attitude toward him.

In 1660 a Sobor, consisting of the Russian episcopate and monastic dignitaries, with a number of Greek hierarchs, was held to deal with the impasse. From the canonical point of view the gathering was illegal, and was denounced as such by Nikon. The Tsar himself must have become convinced of the uncanonical character of the Sobor, for he refrained from acting on its decisions. In the meantime, Nikon, probably rightly assuming that the effort at his deposition was directed by Pitirim, excommunicated him (1662) for consecrating a bishop (Methodius of Mstislav).

At this time there appeared on the scene a clever ecclesiastical adventurer who exerted very great influence upon the course of events. This was Paisius Ligarides, self-styled Metropolitan of Gaza, who arrived in Moscow in the autumn of 1662. He had been educated in the Roman Catholic West, became a Jesuit, later a Uniate, and secured his hierarchical rank

³² Znamensky, *Rukovodstvo*, 202.

in the patriarchate of Jerusalem probably with the financial aid of the Roman curia. His duties were those of "boring from within." That such efforts at effecting a union of the Orthodox East with the Roman West were zealously carried on by the various monastic orders, especially the Jesuits, is abundantly clear from the story of the Ecumenical Patriarch Cyril Lucaris, who fought these insidious schemes throughout his term of office, and in the end fell victim of the machinations of his Roman Catholic opponents.³³ Ligarides had been placed under a sentence of suspension by the Patriarch of Jerusalem on account of his pro-Latin activities. During the entire period of his connection with the trial of Nikon, he was doubtless an agent of the Roman Catholic *De Propaganda Fide* office, for he received instructions from the papal nuncio in Poland as such, and there is documentary evidence that he requested payment for his services from the *De Propaganda Fide*.³⁴

It was this clever and unscrupulous canonist who provided the *boyars* with the legal theory on the basis of which they could proceed against Nikon. *Boyar* Stryeshnev requested Paisius to give his judgment in regard to thirty propositions regarding the relation of church and state, and had reason to be highly satisfied with the answers of the wily Greek, who knew quite well which side of his bread was buttered. Toward the end of 1662, Ligarides himself composed twenty-five similar propositions, in which he affirmed the theory similar to that of Hobbes' *Leviathan*, that the church should be wholly controlled by the state. This led to an exchange of opinions with Nikon, who spiritedly responded to the attack. In one of these rejoinders he said: "You assert that the tsar may appoint archimandrites and all ecclesiastical rulers, that this is one of tsarist prerogatives, and that it is a custom of nations that he [the tsar] should distribute these dignities. But here you have lied just as you always lie. . . . Nowhere in the imperial [Byzantine] laws is it written that it is proper for the tsar to appoint bishops, archimandrites, and other clerics; on the contrary, there exist positive prohibitions in the canons of the holy Apostles, holy Fathers, and in the imperial laws in connection with this subject. Read the Apostolic Constitutions, 30; Lao-

33 Matthew Spinka, "Acquisition of the Codex Alexandrinus by England," in *The Journal of Religion*, XVI (1936), 10-29.

34 Zzyzkin, *Nikon*, III, 128.

dicaea, 13; the Seventh Ecumenical Council, 3; and Antioch, 19. Anyone convicted of having been chosen by temporal rulers, the divine canons refuse to acknowledge, and depose. Moreover, those who appointed them, even though it were the tsar, are subjected to penance; and those who had been appointed in such manner, and had been consecrated bishops, the canons regard as not having been consecrated.³⁵

Thereupon, Paisius Ligarides suggested to the Tsar that the opinion of the four Eastern patriarchs be secured, in order that Nikon might hear the judgment of the merits of his case from his own peers. This was promptly done. In due course, the four patriarchs sent to Alexis, by the hand of the Greek Hierodeacon Meletius, their opinion (May 30, 1664). Their decision was based on the *Epanagoge*, but in such a way that the rights granted to the ecumenical patriarch were denied to the Russian head of the church on the ground that he was only a "local" patriarch. This interpretation was quite legal, to be sure, although the situation envisaged by the author of the *Epanagoge* no longer obtained. For the emperor and the (ecumenical) patriarch were no longer associated in the common exercise of authority over their people, since the emperor was now the Tsar of Russia, and the Russian patriarch was not the holder of the ecumenical dignity. Accordingly, neither Nikon nor the Eastern patriarchs could appeal to the very letter of the *Epanagoge*. But if the principles of this basic law code should be re-interpreted in accordance with the situation actually prevailing, then Nikon's interpretation was as acceptable, in fact was nearer the spirit of the *Epanagoge*, than the view of the four patriarchs.

Nikon refused to accept the document as satisfactory. Accordingly, the Tsar in September, 1664, concluded that he must secure the personal attendance of the four patriarchs, and sent an embassy to deliver the invitation. Of the four patriarchs, only two actually came in November, 1666: namely, Macarius of Antioch, who on his previous long visit had aided Nikon in his reform program, with great pecuniary profit to himself, and Paisius of Jerusalem. The Ecumenical Patriarch, Parthenius IV, and the Patriarch of Alexandria, excused themselves on the ground that the Turkish government refused them permission to leave. Besides these patriarchs, there were eleven

35 *Ibid.*, II, 19.

foreign hierarchs with Paisius Ligarides at their head, who had come to Russia not by invitation to attend the Sobor, but to beg financial aid; besides, there were six Russian bishops who had received their consecration from Ligarides, and eight of Niconian consecration, although four of these latter were known enemies of Nikon. This leaves only three bishops of other classifications. In addition, there were twenty-nine archimandrites and ten monks and archpriests.³⁶ Obviously, a body composed of so large a group of the government's dependents as were most of the foreign hierarchs, and of Nikon's enemies, was certain to condemn the Patriarch whom the government was determined to put aside.

The trial was presided over by the Tsar himself. On each side of his throne sat the patriarchs. Nikon entered the hall with all the patriarchal ceremonial, the cross being carried before him. All stood up when he entered. He bowed three times before the Tsar, twice before the patriarchs. When asked to sit down, he refused because no seat (that is, on equality with the other patriarchs) had been prepared for him. He asked whether the patriarchs possessed authorization from the Ecumenical Patriarch, Parthenius, to judge him. They pointed to the documents lying on the table before them as embodying such an authority. This was not true, for Parthenius did not give the two patriarchs any authority to represent him, and in fact during the trial deposed them for having attended the Moscow Sobor without his permission.³⁷ They had pretended to go to Russia to ask for financial aid for their flock. Nevertheless, Nikon accepted their assurances, and thus submitted to their jurisdiction. But the deceit practiced by the two patriarchs in falsely claiming to act with the authority of the Ecumenical Patriarch in itself renders the entire proceedings canonically invalid.

The chief charges against Nikon centered upon his alleged repudiation of the patriarchal duties and his offence to the Tsar. To the first, Nikon replied, as he had done many times previously, that he had not surrendered his office, but had withdrawn from Moscow because he had feared the Tsar's wrath. The judges refused to accept Nikon's assertion, and continued to hold that he had renounced the office with an oath. The

36 *Ibid.*, III, 133-134.

37 *Ibid.*, 134.

point at issue was not that Nikon insisted on retaining the patriarchal office. He well knew that without the Tsar's favor, he could not carry on his program. In fact, he was willing that another patriarch be elected, but insisted that such a step must be taken with his consent. But his opponents—principally the *boyars*—were determined to prove Nikon guilty of a transgression. That was the real heart of the controversy.

As for the other charge, it rested upon Nikon's protests against the Tsar's illegal interference with the ecclesiastical administration. He based himself upon the *Epanagoge* legislation, while his opponents, although ostensibly paying homage to the same code, in reality argued on the basis of Paisius Ligarides' Erastian interpretation of the relation of church and state. Accordingly, they claimed that the Patriarch exceeded the limitations of his office.

The patriarch-judges cited as their norm the second canon of the Council of 879, to the effect that anyone who abandoned his see should not be allowed to resume it.³⁸ But Nikon was quick enough to detect that this canon was incorrectly cited, and was not applicable to his case. Moreover, he had heard during the trial from some Greeks that the patriarchs had been deposed in the meantime by the Ecumenical Patriarch, and charged his judges with it. They denied the assertion, although it turned out to be correct.

Under these conditions, it is no wonder that Patriarch Nikon was condemned, deposed from his office, deprived of all his ecclesiastical dignities, and reduced to the state of a simple monk. Nikon replied to his judges: "You would not dare to so speak and act, had you not received permission from the Tsar!"³⁹ Thereupon, he was sent to a monastic prison.

Zyzykin declares that the trial was uncanonical. "An analysis of the actions of the trial shows that the Nikon trial cannot be called a juridical process, for it was a political trial in the sense of a predetermined procedure for the purpose of reaching a goal previously decided upon, but dressed up in juridical forms."⁴⁰ The two patriarch-judges presided over the trial as if they represented all four Eastern patriarchs—particularly the Ecumenical Patriarch—although their claim proved untrue. According to Kapterev, they received from the Rus-

38 *Ibid.*, 140-41.

39 *Ibid.*, 145.

40 *Ibid.*, 154.

sian government and other sources 200,000 rubles (modern nineteenth century calculation) each⁴¹—which transaction might easily be viewed as bribery.

The opinion of Zyzykin, so uncompromisingly defending Patriarch Nikon, appears extreme. He fails to take into consideration the flaw in Nikon's argument based upon the *Epanagoge*, namely, that the powers ascribed to the patriarchal office are expressly granted to the ecumenical patriarch, not to one of the "local" patriarchs. This is the weak point in Nikon's defense, for he himself was the least of the Eastern patriarchs. But on the other hand, the two patriarchs who sat as judges upon him—particularly Patriarch Macarius, who had approved Nikon's reforms throughout the four years of his residence in Russia—really subverted the whole theory of the dual nature of the church-state relationship, and thus nullified the very spirit of the *Epanagoge* upon which they claimed to base their deliberations. Consequently, they helped to secure the victory for the fundamentally antagonistic theory of Caesaropapism which subordinated the church to the state. The two eastern patriarchs openly supported the Tsar by asserting that he is supreme over all his subjects, the Patriarch not excluded. This was clearly contrary to the theory of "the harmony" of the church-state spheres asserted by the *Epanagoge*. As such, it was an abandonment of that ancient Byzantine theory, and a repudiation of Nikon's struggle in behalf of it.

The result of the condemnation of Nikon was far-reaching: it was nothing less than the subjection of the Russian church to the state. This was formally completed in the days of Peter the Great, but it goes back for its initial stage to the condemnation of Nikon. Thus the common assumption that the "Caesaropapism" of the Russian ecclesiastical polity was part and parcel of its Byzantine tradition is fundamentally inaccurate. Nikon represented the Byzantine tradition derived from the *Epanagoge* code, but this tradition suffered defeat along with him at the hands of the Western Erastian tradition represented at the Sobor of 1666 by Paisius Ligarides, and later much more forcefully by Peter the Great.

41 N. Th. Kapterev, *Patriarkh Nikon i tsar Aleksei Mikhailovich* (Sergiev Posad, 1912), II, 490.

ETHICAL THEMES IN THE ANTIOCH MOSAICS

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Students of the cultural history of the late Roman and Byzantine periods sometimes speculate as to what may have been the ordinary daily intellectual interests—the private store of detached thought and emotion—of the average educated men of those times. To us, the literary activity of those centuries seems a barren skeleton, picked bare by the sophists, an abhorrent thing in which we can find no real interest. The formal philosophy of the schools was a wild business whose fantastic flights seem to many of us today to be quite incredible and absurd. We can perhaps understand a little better the intellectual and political interest which attached to the theological controversies, though these often went to lengths which seem to us to be excessive. Private religious experience there was, of course, and there was an emotional outlet in Christian art which we can understand quite well. But even the total of these things will not perhaps satisfy our curiosity; whether rightly or wrongly, we find it difficult to understand that a man's life can have been made up of these things alone, and we wonder what a mind of at least some independence and vigor can have found as a basis for its individual existence.

The answer to this last question is being suggested, here and there. A part of the answer is being indicated by some of the mosaics which have lately been found in the excavation of Antioch in Syria.¹ Antioch has been well known as an important center of Christian activity—first as the center of missionary effort, later as a seat of learning, in which the doctrines of the

¹ The mosaics have been published in *Antioch-on-the-Orontes, I: The Excavations of 1932*, ed. by G. W. Elderkin (Princeton, 1934), and in *Antioch-on-the-Orontes, II: The Excavations, 1933-1936*, ed. by R. Stillwell (Princeton, 1938), and in *Antioch-on-the-Orontes, III: The Excavations, 1937-1939*, ed. by R. Stillwell (Princeton, 1941). The historical background of the mosaics, and their place in the history of art, have been studied by C. R. Morey, *The Mosaics of Antioch* (New York, 1938). For accounts of the history of the city, consult C. O. Müller, *Antiquitates Antiochenae* (Göttingen, 1839); E. S. Bouchier, *A Short History of Antioch* (Oxford, 1921); and V. Schulze, *Antiocheia* (Gütersloh, 1930).

"school of Antioch" rivalled those of the school of Alexandria, and as the home of celebrated figures in the church, the most famous of them St. John Chrysostom. At the same time there persisted, in this wealthy and worldly trading-city, a strong core of the old pagan life and thought. The famous teacher Libanius kept the ancient culture alive in his school down to the end of the fourth century; the Neo-Platonists were active there, and there is good reason to believe that a considerable part of the reason why the apostate emperor Julian settled at Antioch was that he believed that the city was a fit headquarters for his program of the reorganization and reform of Hellenism.² When the city thus represented such important activities and developments in both pagan and Christian life, any new material that emerges from it takes on peculiar interest.

The first, and in some respects the most important of the recent discoveries came with the recovery in the excavations of the personification of *Megalopsychia* in a villa of the late fifth or early sixth centuries in Daphne, the celebrated suburb of the city.³ The handsome head and shoulders of a female figure dominate a rich mosaic floor. The personification, in a medallion in the center of the pavement, holds a rose in one hand and a basket of flowers in the other arm; the label *Megalopsychia* is inscribed on either side of the head. Surrounding the medallion are six scenes of hunters in combat with wild beasts; the huntsmen are named in labels: Meleager, Actaeon, Tiresias, Narcissus, Adonis, Hippolytus. Finally there are four symmetrical groups of beasts in combat with each other.

Speculation at first was that this is Plato's *Megalopsychia*—Arrogance; the six hunters were destroyed because they incurred the wrath of the gods, and divine vengeance, by their *megalopsychia*.⁴ Soon, however, it was pointed out that this use of *megalopsychia* is rare and that this reading of the mosaic deprives it of any allegorical significance; some special meaning must have attached to the hunts because Tiresias and Narcissus are not traditionally huntsmen. The mosaic would be rather

² See a paper by the present writer, "Julian the Apostate at Antioch," published in this journal, VIII (1939), 307-308.

³ *Antioch* I, 114ff.

⁴ In this paragraph I quote from an earlier article, "Personifications of Abstract Ideas in the Antioch Mosaics," *Transactions of the American Philological Association*, LXIX (1938), 349-363. The reader may find there more detailed discussion, with the bibliography, of the views of various scholars which are presented here in brief.

an effort to glorify, under the name of *megalopsychia*, the courage of the hunters who fought in the *venationes* of the amphitheatre. Another view is that the central figure personifies the great-heartedness or generosity of a patron who endowed a *venatio*. Still another interpretation—more convincing than any of the preceding, but still not wholly satisfactory, in the writer's opinion—is that the scene represents the Aristotelian conception of *megalopsychia*⁵: "... that man is *megalopsychos*, 'great-souled,' who deems himself worthy of great things and is in fact worthy of them." This conception formed a part of the program of education and the portrait of the ideal ruler which was set before generations of Hellenistic rulers in the *Nicomachean Ethics*. Alexander himself, Aristotle's pupil, was the model of the Hellenistic kings and of several Roman emperors. Thus the mosaic would be an example of the "imperial hunt" which is one of the standard themes of Hellenistic and Roman art and passes into Byzantine art. Animated by *megalopsychia*, these hunters are seen to conquer the beasts which they attack; under the mythological disguise, the scenes represent the symbolical hunts which appear on Roman reliefs and form the basis of the images of the hunter god: the theme is found also in Roman literature. At the basis of all this is the moral idea of *megalopsychia*, giving inspiration and training by means of the hunt.

Further study of this and other mosaics found at Antioch, however, and reflection on the picture of the intellectual life of the times which scholars have been building up in late years, suggests that this is not the whole story behind the *Megalopsychia* of Antioch. In the first place we have to realize that in these mosaics we are dealing with allegories, possibly very complicated mental conceptions which come to us mutely from the past, with nothing of their original context, nothing of the original thoughts and desires of their owners and their makers remaining with them. We must, therefore, understand clearly the danger of reading into these allegories meanings which we ourselves would like or would expect to find in them. Such meanings may indeed have been present, but they may have been accompanied at the same time by other meanings—significances which may not be entirely clear to us or meanings whose importance in antiquity we may not fully appreciate.

5 Aristotle, *Nicomachean Ethics*, 1123 b 1 (IV, 3, 3).

It seems very possible, indeed, that at least a part of the value and importance of these mosaics in antiquity was that they might have, for different people, or even for the same people in different moods and circumstances, different meanings. With this in mind, let us pick out and examine certain aspects of the mosaics which seem to promise a clearer understanding of the context in which they were made.

First, there is another interpretation of the *Megalopsychia*, a far more convincing and natural one.⁶ The readings enumerated above are not wholly satisfactory because they do not account entirely for the two sets of scenes of animals and because they do not fully explain the presence of Tiresias and Narcissus, who were far from being huntsmen *par excellence* as the other figures were. If we turn to a popular conception of *megalopsychia*, one which has not yet been considered in this connection, what seems to be the best explanation of the whole allegory will be found. According to this conception, which appears in Diogenes Laertius, a popular writer on philosophy of the early decades of the fourth century after Christ, *megalopsychia* was defined by the Stoics as "the knowledge or habit of mind which makes one superior to anything that happens, whether good or bad equally."⁷ The *megalopsychos*—the man who possessed this habit of mind—would thus be imperturbable, serene, a calmly superior mind detached from the fluctuations and blindnesses of human life.

If it be supposed that the central medallion of the floor represents this conception, then the scenes around it will take on new meaning. There are two circles of scenes. In the inner circle animals of prey kill peaceful animals—a goat is pursued by dogs, a bull by a bear; a lioness brings down a horse, and a stag is overcome by a lion. Then, in the outer circle, these same animals of prey are conquered by the superior power of human hunters. But all these hunters were, in turn, tragic figures who in the end were to incur the wrath of the gods and were made to suffer as they had made to suffer their prey, and as these had themselves made to suffer their peaceful victims. In the center, finally, stands *Megalopsychia* who in the midst of this cycle of

6 This was suggested to the writer by Professor Erwin Panofsky of the Institute for Advanced Study.

7 Diogenes Laertius, VII, 93; see also VII, 128. A similar view is expressed by Plotinus, *Enneads*, 1, 6, 6, and I, 4, 7.

defeats and victories, conquest and retribution, preserves her calm, serene attitude.

This interpretation gives the floor a unity and a didactic force which the previous readings fail to find in it. It raises further questions, which may be postponed for the moment. At this point the most arresting idea is the realization that this same conception, in a significantly different form, appears in another mosaic from a villa in the same suburb.⁸ Here the composition is less elaborate, but no less lively. In a rectangular floor, whose corners are defined by trees growing up toward the center of the composition, are more scenes of the chase. There are seven huntsmen, four mounted, three on foot. They slay various animals, a lion, a bear, a leopard, a boar. The scenes are not as formally drawn as in the preceding mosaic, but the action is more vigorous.

The figure which arrests attention is that of the man who stands in the very center of the floor. Wearing a panther skin over his head, with a tunic, and breeches which reach to his knees, he stands rather negligently and at ease; he leans on a spear, with his hand on his hip, and one leg crossed over the other. He gazes off to his right, and seems quite oblivious of the carnage going on about him. Here of course one thinks at once of the commanding figure in the other floor. There it is *Megalopsychia*, the "virtue" or quality which raises one above such strife. Here there is no label, and the figure is that of a man, a human being like the huntsmen, and not a majestic personification. Placed among the same surroundings, with an obvious note of detachment and serenity in his whole aspect, this man must be the *megalopsychos*, the fortunate individual who through his training and endowment is enabled to rise above the struggles of his fellow men. His detachment is underlined in a subtle manner, for at his feet lies a boar which, apparently, he has slain; he has himself taken part in the struggle, but has risen above it.

If this interpretation is the true one—and it seems hard to doubt it—the change in the method of the allegory is important. Here no label is required, and the figure is that of a man, not a personification. The virtue, the quality of *megalopsychia*, is still the point of the allegory, but it is presented in the most human terms possible; the change from the use of personifica-

8 Antioch II, Plates 71-73; catalogue of mosaics, 200-202.

tion seems to make the moral lesson more concrete and more immediate. Moreover, this very change—the absence itself of the label—would show that the teaching was no recondite philosophical dogma, but was a live message, which people could understand and appreciate without having it explained to them.

It is clear—it would indeed be plausible without these two plain examples—that behind their decorative beauty these mosaics have a serious didactic purpose. Let us turn to still another floor which seems to have carried, in a somewhat different and rather more curious way, another message.⁹ This is the splendid mosaic from a villa of the period of Constantine the Great at Daphne, a century and a half or two centuries earlier than the works which have just been examined. In the center is a hexagonal opening, evidently designed to contain a fountain. From this radiate four trapezoidal panels separated from one another by four figures which rise from the four angles of the square floor. The border of the floor is made up of figured panels, three to each side of the floor, and in the four corners are four square panels. The four trapezoids contain hunting scenes; the oblong panels represent pastoral episodes, and other peaceful scenes of ordinary life.

The square panels, and the figures which rise above them between the trapezoids, will claim our chief attention. The latter, full-length female figures, winged, and dressed in rich clothing, are of plain significance: they are personifications of winter, spring, summer, and autumn; each has the attributes and the costume of the season which she represents. The square panels at the feet of these figures contain female busts, each with a label: *Ktisis* at the feet of Winter, [*Anan*]cosis (the label is damaged) at the feet of Spring, *Euandria* at the feet of Summer, and *Dynamis* at the feet of Autumn. It is evident at once that these personifications are intended to be references to the seasons with which they are connected: *Anan-cosis*, Renewal, is the chief function of Spring, and *Dynamis*, Power or Strength, comes with Autumn, the time when ripening crops gain their full strength and give man his harvest. These are commonplaces; it is the other two connections which give the clue to more of an allegory than the first two personifications alone would suggest. The counterpart of Summer is *Euandria*. This shows at once that the personifications do not

⁹ *Ibid.*, Plates 62-68; catalogue, 197-200.

merely serve to mirror the seasons, but instead are employed to lend them an ulterior significance. *Euandria*, Maturity, is a natural enough counterpart of Summer. Perhaps the most obvious counterpart, however, would be *Eutekncia*, Fertility, and the appearance of *Euandria*, an attribute of man rather than of nature, indicates that we have to do with an allegory in which the four seasons of the year are equated with the four ages of man. This (and even more) is shown by the presence of *Ktisis*.

This word might be translated by either Possession or Foundation; and Possession brings with it Enjoyment, which is also a possible translation of *ktisis*.¹⁰ Winter is the time when man possesses and enjoys the fruits which have grown from spring through autumn, and it is likewise winter which carries hidden the seeds which will rise in the spring. In the same way it is in old age, the winter of life, that one is able to possess and enjoy the fruits of the preceding seasons of life.

With the seasons of the year, then, are linked the four ages of man. This is a common enough thought. One wonders, however, whether this was the end of the idea. In the *Palatine Anthology*¹¹ there stands an epigram of Gregory of Nazianzus, three lines written in reflection on a picture in the Church of St. Basil at Caesarea: "As thou lookest on the image of the four life-giving Virtues, stir thy mind to willing toil; for the labor of piety can draw us to a life that knows not old age." What the four life-giving virtues were, is not indicated; presumably, from the setting of the epigram, they were the cardinal virtues, Justice, Fortitude, Temperance, Prudence. Gregory's meditation suggests that some spectators may very well have put an analogous meaning on the mosaic, or at least that it may have stirred, on occasion, similar thoughts.¹²

10 On the meaning of *ktisis*, see a note by P. Kretschmer in *Glotta*, III (1912), 316, and G. Downey, "Imperial Building Records in Malalas," *Byzantinische Zeitschrift*, XXXVIII (1938), 1-15. The stick which the figure of *Ktisis* in the mosaic is holding appears to be a weeder or hoe, which is an attribute of winter in a Roman mosaic found at St. Roman-en-Gal, near Vienne, in France, described by J. C. Webster, *The Labors of the Months in Antique and Mediaeval Art* (Princeton, 1938), 33. In a mosaic from Carthage, January bears a forked stick, and in a miniature in the Vatican, December holds the same emblem (*Ibid.*, 22).

11 I, 93; I quote the translation of W. R. Paton in the *Loeb Classical Library*.

12 With the representations of the virtues and of the seasons, and their allegories, which are discussed here, it is of great interest to compare the similar representations in medieval art in the West, which are much more plentiful than those which have survived in the East. The western types have recently been made the subject of an important monograph by A. Katzenellenbogen, *Allegories of*

The writer realizes only too well that observations such as these do not by any means cover all the questions which the mosaics raise, and that further study may bring modification of them. The principal point, which it seems imperative to establish as soon as possible, is that these mosaics, no matter what their outward richness or their learning or sophistication, were capable of conveying a message in what were probably the simplest terms in which such messages could be conveyed pictorially, and that at the same time, by being pictorial allegories, they could convey different messages, or different aspects of the same message, to different people, or to the same people in different moods. Must *Megalopsychia*, for example, have been exclusively either the indifference of pessimism and despair, or courage and serene hope? Could it not have been one thing to one man, and another to another? Here we have, in any case, a reflection of the minds of men of the times—a reflection which we perhaps cannot get in any other way—which we can plumb again and again. Here people could look into their souls—much as, in one of the mosaics, a young man lying on a couch gazes at a mirror, symbolizing the doctrine of Plotinus concerning the way in which the souls beheld images of themselves in a mirror.¹³

There is a final thought with which we may leave these mosaics for the present. Their teaching may indeed be found in the philosophers, but it was not invented by them, and was not their sole property. Scholars have lately turned their attention more and more to the ordinary people, educated and uneducated, of the Roman world, and have been able to detach some of the wisdom and the thinking of these people from the literary associations with which scholars' instincts have inevitably clothed them. There was much there that needed no scholastic origin. *Megalopsychia* need not have been the prerogative of the educated, and the word itself—and by the same token the mosaics of Antioch, and other similar pictures which have perished—could have been understood by the most humble. These things are so close to Christian doctrine that it is very hard to draw a line between them and to put the word pagan on one side of it. A typical situation arises in connection with the

the Virtues and Vices in Mediaeval Art (London, 1939.) There is a characteristic passage on the seasons of human life in Diogenes Laertius, VIII, 10.

13 Plotinus, *Enneads*, IV, 3, 11-12, 30. See also Philo, *De virtutibus*, 11-12. The mosaic is illustrated in *Antioch II*, Pl. 78, no. 100 B, and (in a larger plate) in Morey, *The Mosaics of Antioch*, Pl. XII; it is now in Princeton.

mosaic of the Phoenix which was found in a villa in Daphne in 1934. In his study of the floor,¹⁴ Jean Lassus points out that, taken by itself, the symbolism here could be given four interpretations, according to which the Phoenix might be a god, shown here in a cult image, or (by derivation from this) a simple symbolical representation of eternity, or again a Christian symbol of the resurrection and the eternal life, or, finally, a symbol of the eternity of the Roman Empire. In the context, the last reading is evidently the correct one; but the fact that the other possibilities exist is highly significant. One of the great questions which some of these mosaics raise, indeed, is that of their value and significance as reflections of the political thought of the time. Some political significance they do seem to have, and in an age such as the late Roman Empire when political currents are so obscure, such evidence as the mosaics is of the greatest value. Do they represent propaganda of the government, or are they the slogans of a discontented aristocracy? These mosaics were very likely seen daily by the men of affairs—some of them high government officials—who lived at Antioch. Some of these men, indeed, may have ordered these very mosaics, or others like them (now lost) for their houses. The mosaics must have meant a good bit to them, and they must have been very familiar with the ideas which the floors set forth in permanent embodiment.

A historian of medieval Europe has lately examined the question (with regard to the High Middle Ages), "To what degree were the ideas of thinking men secular or ecclesiastical?"¹⁵ The point is in itself arresting because, as Professor Boyce observes, "it is a secular age that poses the question and also one that most commonly holds that the terms 'secular' and 'ecclesiastical' are mutually exclusive." When we turn to the Antioch mosaics with this in mind, it becomes plain that there is much to be done here by scholars who are concerned to discover and trace the elements in which and among which early Christianity developed. These personifications (and others like them which are now lost) must after all reflect pretty closely the dinner-table conversation of the city, and if we can try to

14 "La mosaïque du Phénix provenant des fouilles d'Antioche," *Monuments Piot*, XXXVI, 5 (1938), 24. The mosaic is illustrated in M. Lassus's article, in *Antioch II*, Pl. 43, and in Morey, *The Mosaics of Antioch*, Pl. XXIV.

15 G. C. Boyce, "Medieval Intellectual History: Ecclesiastical or Secular?" in *The Cultural Approach to History*, ed. by Caroline F. Ware (New York, 1940), 202-211.

grasp even some of the implications which their appearance suggests, we shall understand a little better what went into the making of the minds of the men of those times, whether pagan or Christian.

For the purpose of the present paper, however, the chief point to retain is that it is perhaps most truly a popular philosophy of which we have a glimpse here—a philosophy which might be shared by the man in the street and the owner of a villa at Daphne. Such “popular” philosophy must be ever before the minds of those who study the more formal and better-known aspects of late Roman and Byzantine history. It is becoming increasingly evident that there was a *koinê* of religious and philosophical thought¹⁶ which, while it may have academic roots or academic counterparts, nevertheless had its own natural existence independent of any school or of any literary association.¹⁷ It is indeed ironical that in order to discover these things scholars now have to thread their way through a complicated mass of material, while some of the difficulties among which they grope would have been either non-existent or unimportant in antiquity.

The “popular” philosophy is more important than one might at first be inclined to think, and it may be the explanation, in part, of the astonishing strength of the late Roman Empire. It represents the experience which led a very wise scholar to write, not long ago:¹⁸ “. . . when I am myself in doubt among the philosophers I turn to the consensus of human opinion, to the beliefs of the plain man, that strange, indefinable being, on the surface ridiculous, in the depths profound. If he had words in which to express himself he could tell us things worth knowing even about the greatest matters, even, I think, about the soul. You remember the curious and interesting Old Testament story of Balaam, a man of great reputation in his day, so great that the King of Moab sent for him in extremity. And he saddled his ass and went to meet Balak, King of Moab. And the Lord sent an angel to prevent him, and the angel stood across his path. And Balaam, though a man of high intelligence, did not see the angel of the Lord, but the ass saw him.”

16 I owe the phrase to Harold Mattingly, in a recent letter.

17 An instructive study in this direction has lately been made by A. D. Nock, “Orphism or Popular Philosophy?” *Harvard Theological Review*, XXXIII (1940), 301-315. A study of a somewhat similar topic by the present writer has appeared in a preceding issue of this journal, “The Pilgrim’s Progress of the Byzantine Emperor,” *Church History*, IX (1940), 207-217.

18 W. M. Dixon, *The Human Situation* (New York, 1937), 389.

FRANK S. BREWER FUND PRIZE CONTEST

The Brewer Prize for the year 1941 has been awarded to Dr. Frederick A. Norwood of the College of Idaho for an essay entitled "The Economic Life and Influence of the Protestant Refugees during the Sixteenth Century."

Eight essays were submitted.

F. W. BUCKLER,
Chairman of the Board of Adjudication.

The next award will be made in 1943.
September 30, 1941.

BOOK REVIEWS

THE CHURCH OF OUR FATHERS

By ROLAND H. BAINTON. New York: Charles Scribner's Sons, 1941. 248 pages. \$2.50.

One of the difficulties in the field of Religious Education has been the poverty and thinness of the curriculum and of the scholarship of the writers of curriculum materials. This has been notably true of church history—an area which we are coming to believe has great significance. Accordingly we approach with eagerness a book by a scholar in the field of church history, written for boys and girls. That the book was in some measure a family product adds to our interest.

Through the wealth of interesting woodcut illustrations and the many quotations from first hand sources, the spirit of different times and events grasps the reader. The book carefully covers a wide range of material so that almost any query about "how did this part or custom of the church begin?" will be answered. These features are the major strengths of the book and make it an important one for supplementary reading and reference at the Junior High School level. Many public schools will welcome it.

The major criterion by which such a book is to be evaluated for religious education purposes would seem to be "To what extent does it help boys and girls to become aware of the church as a Christian fellowship, a stream of influence revivifying and redeeming the life of man down through the centuries?" Possibly due to limitations inherent in the subject matter itself, Dr. Bainton meets this criterion adequately only so long as he is dealing with the early Christian church. The comment of one Church School worker seems just:

"The book leaves a feeling of endless and perhaps pointless see-sawing struggle. I miss a note of triumphant faith, and a sense of a thrilling movement which I believe should be present, but without misleading indoctrination."

To follow the atomism and isolationism of the commonplace academic outline of church history instead of weaving a pattern of church history into the drama of the great struggle of the common man for freedoms and a more just society; to interpret, for example, George Fox's refusal to take off his hat before kings and authorities as due to his belief that it was "silly politeness," rather than to see such action in the framework of the great movement which was declaring that "God alone is lord of the conscience," is to waste scholarship and keep from our children that which is most important.

Nevertheless, *The Church of Our Fathers* is the best "good standard story of the early church and Protestantism for young readers" which we possess. Combined with a more strictly biographical approach such

as *Good Christian Men* by Davidson, it will be of great service. May more scholars be moved to make available their riches to boys and girls!

The Chicago Theological Seminary.

Ross Snyder.

THE SPIRITUAL LIFE ACCORDING
TO SAINT ISIDORE OF SEVILLE

By SISTER PATRICK JEROME MULLINS, O. P. Washington, D. C.: Catholic University of America Press, 1940. xi, 212 pages. \$2.00.

This doctoral dissertation will appeal particularly to ecclesiastical historians and theologians. The first chapter dealing with the life and character of Isidore, despite its sketchiness (facts concerning him are few), is the best biographical account of the Saint available in English. Hardly less significant is the second chapter which contains an excellent but all too brief discussion of the sources of his spiritual ideas. It has long been known that the illustrious bishop of Seville drew his material from earlier patristic literature rather than from his own speculation or, as he himself puts it: "the student reads not my doctrine, but re-reads the ancients. It is they who say what I teach, and my voice is their tongue" (42). Next to Holy Scripture, Isidore relied chiefly on Augustine in dogmatic matters and on Gregory the Great in ethical questions, but he utilized many other theological writers. Leclercq enumerates twenty-one Christian authors whom he cited in one form or another, and Lawson has recently added sixteen new names to the list. Further research on his theological treatises will doubtless discover more. Sister Patrick Jerome's principal contribution in this chapter consists of a study, in parallel columns, of some of the original passages together with Isidore's abridgments or paraphrases of them. His use of texts is sufficiently original to absolve him from the charge of being a mere plagiarist; he had ideas of his own and a remarkable skill in condensation. His knowledge of Greek and Hebrew is still disputed; but evidence is accumulating to show that he made use of works in both languages, especially in Greek.

The last three chapters of the dissertation provide a useful summary of Isidore's doctrine on the spiritual life. The author groups her material under the headings, "The Foundation of the Spiritual Life," "The Way of Perfection," and "The Ideal of Perfection." An analysis of the nature of sin—the greatest obstacle to man's perfection—is followed by an illuminating account of penitential discipline as exhibited in the canons of the Spanish Councils and in Isidore's various writings. The exceptional emphasis on the necessity of compunction, revealed in some of these excerpts, is explained by the fact that private iterative reception of the sacrament of penance was forbidden by Spanish ecclesiastical authority, and canonical penance was usually deferred to the hour of death. Perfection is impossible without grace, and the action of grace must be reconciled with free will. In this connection Isidore has been accused of teaching absolute predestination, but it would appear that he was merely unhappy in his choice of expressions to describe the gratuitous nature of grace. Human cooperation with God's will requires a practical asceticism; here the learn-

ed bishop counsels moderation, preferring mortification of the will to bodily austerities. Incorporation with Christ in His Mystical Body, is the beginning and end of all perfection; bishops and priests should be models to their flocks; kings and nobles ought to be humble and manifest a solicitude for the welfare of those under them; the religious state affords the best opportunity for divine contemplation. There is no evidence that Isidore, himself, had any personal mystical experience.

At times, the author renders Isidore's graceful Latin in a clumsy manner (*e. g.* 100) or misses the meaning of a word entirely, as when she translates "*lasciviam*" as "pride" (185), but, in general, she has done a commendable piece of work. The book is equipped with an up-to-date bibliography and an index.

Xavier University, Cincinnati, O.

Raymond J. Gray, S. J.

TORQUEMADA: SCOURGE OF THE JEWS

By THOMAS HOPE. London: George Allen and Unwin, Ltd.; New York: W. W. Norton and Company, Ltd., Distributors, 1939. 245 pages. \$2.50.

In this age of notorious and new order bigots, who are destroying the historical foundations of civilization, it is profitable to read this study of anti-Semitism, nationalism, and persecution in Spain during the fifteenth century, the period when there was being firmly established the principle of nationalism, which is, in its current repulsive form, one of the harassing factors in the existing world crisis. This fifteenth century zealot, Torquemada (1420-1498), who became Inquisitor-General of Spain in 1483, collaborated with Ferdinand and Isabella in making Spain a strong, politically united country by using the Inquisition to eliminate through the *auto da fe* more than two thousand Jews who, having been converted to Christianity, became apostates. One chapter of the book contains an analysis of the trial of certain Jews for "ritual murder," which was effectively used by Torquemada to secure the expulsion of the Jews from Spain, just as Hitler was helped to power by the Reichstag fire and the subsequent trial at Leipzig. The persecution of the Jews in Spain, cruel and misguided as it was, was a factor in bringing about nationalism in Spain at the expense of feudal anarchy, whereas the policy of Hitler, the current anti-Semite, is wholly disastrous and retrogressive.

Mr. Hope's introductory chapters portray the Spanish conditions of political disunity that were transformed into unity under Ferdinand and Isabella. The author shows how the pope since the middle of the thirteenth century had far more authority in Spain than in any other country, but then narrates how that problem was finally solved by reducing the Church to the position of a branch of the state, by establishing the Inquisition under the control of Torquemada. Torquemada, a Dominican monk, having an ordinary career during the first sixty years of his life, came to be the most powerful man in Spain, in charge of the Inquisition, a religious corrective and unifying institution. Being a descendant of a Jewish grandmother, Torquemada wished to make expiation therefor by following a policy of antagonism to those Jews who, having become Christian

converts, later relapsed into apostasy. Having achieved that purpose, he completed his expiation by driving the Jews from Spain entirely. Torquemada, in formulating his plan of establishing a Spanish Inquisition, wholly directed and controlled in Spain, had the hearty support of Isabella, who was unwilling to have any foreign interference in Spain. The co-operation of Ferdinand was easily won, since the confiscation of Jewish property would meet royal financial needs incident to the war against the Moors. There is a good portrayal of papal efforts to restrict and nullify the Spanish Inquisition, and to use that institution to pontifical material advantage.

The Inquisition that Torquemada set up was unlike the Inquisition that had previously existed in Spain since the thirteenth century. The earlier Inquisition was a means of enhancing the authority of the pope and of combating wrong interpretations of Christian doctrine. The objectives of the Inquisition under Torquemada were to destroy not so much heresy as the apostasy of the Jewish converts to Christianity, and to achieve this through an institution that remained independent of the pope. To accomplish this Torquemada had to remain dependent on the crown; the Inquisition became a department of the Spanish state, and the laws stating the purposes and regulating the actions of the Inquisition were made by Torquemada without any approval of the Papacy.

Mr. Hope's long, clear account of the LaGuardia trial incorporates all new evidence and shows how it was utilized in 1492 to expel from Spain all Jews that would not accept Christianity. An interesting sidelight on the expulsion is the fact that the refugees went, among other places, to Rome, "where they were treated with enlightened tolerance by the Pope, a Catalan himself, Alexander VI."

Torquemada, having achieved his purpose as Inquisitor General by 1492, lived six years longer, retaining a clear mind, but, as ironic fate would have it, he who racked the lives of so many victims with physical pain and mental anguish, had to suffer the sharpest pains owing to gout, which usually does not afflict those living lives of abstemiousness, as did Torquemada.

There is a brief but splendid concluding chapter summarizing the character and work of Torquemada, and harmonizing through an integrating interpretation the apparently conflicting estimates of four previous commentators. There is a bibliography of sources and other works, and a useful index. There are eight pertinent illustrations.

University of Colorado, Boulder, Colo.

C. C. Eckhardt.

THE PHILOSOPHY OF SCHLEIERMACHER

By RICHARD B. BRANDT. New York: Harper and Brothers, 1941. 350 pages. \$3.00.

This volume is a scholarly, instructive, and important contribution to the question: what is modern church history? It is important because an answer is suggested in terms of the inner development of the Church's life and thought rather than in terms of the shifting tides of secular culture

and civilization. The issue is whether Schleiermacher was philosopher rather than theologian, and if so, whether he was a good or a bad philosopher. Professor Brandt argues very convincingly, I think, that there is an unbroken, though devious, line between the *Discourses* and the *Dialectic* and the *Christian Faith*, because Schleiermacher was preoccupied with the question of an epistemological vindication of the independence and validity of religion. When one takes into account, as the author ably and fully does, Schleiermacher's commitment to "a higher order" of Moravian, the domination of the epoch in which he worked by the critical philosophy, and the apologetic urgency of the time, it is not strange that the epistemological problem should have seemed to him both strategic and fruitful. But what has not been sufficiently taken into account is the fact that the exposition of the Christian faith does not depart from this epistemological preoccupation. The traditional dogmatic formulations which it contains are, according to the author, partly due to Schleiermacher's desire to avoid the change of pantheism, and more especially to his absorption with the question of the independent character of religious feeling. On this account he was led to underestimate the noetic element in feeling which his earlier works had established. It may be contended that "because his discussions of fundamental issues always seem to be the least happy" (291), Schleiermacher was a bad philosopher. But—perhaps just because the author of this book is a philosopher—it is plain from these pages that he was more of a philosopher than a theologian.

If this be correct, then modern church history ought properly to begin with Schleiermacher. Then, too, it is very modern indeed both in the sense of being very contemporary and in the sense of being something quite other than the Church of the Reformation. Indeed, one would have been grateful to Professor Brandt for an additional chapter on the meaning of his study for the dogmatic in relation to the philosophical interpretation of Christianity. He would then almost certainly have had to take account of the interpretation of Schleiermacher by the dialectical movement. I mention this not simply to ask for "more"; but because it seems to me essential to the major problem of the book.

It has been heartening and rewarding to read so scholarly and instructive a work. I can only commend it highly for its painstaking searching of the immense body of literature both from Schleiermacher himself and about him and for its thorough tracing of the integral development of his thought.

Wellesley College.

Paul Lehmann.

GRANITE FOR GOD'S HOUSE

THE LIFE OF ORESTES AUGUSTUS BROWNSON

By DORAN WHALEN. New York: Sheed and Ward, 1941. 366 pages. \$3.75.

Orestes Augustus Brownson (1803-1876) was on the way to becoming the forgotten man of the middle period of American History, but the work of Arthur M. Schlesinger, Jr. (*Orestes A. Brownson, A Pil-*

grim's Progress [Boston, 1939]), and Doran Whalen will rescue him from that undeserved fate. Brownson, who changed religious affiliations so often that Parker described him as "a commonplace book of theology," has always been an enigma to historians. Reared in a Vermont village by charitable neighbors to whom his widowed mother had surrendered the care of her children, always self-centered, largely self-educated, Brownson was in turn a Presbyterian, a Universalist minister, a free-lance minister and editor, an associate of Robert Dale Owen and Fanny Wright in organizing the Working Man's Party, a Unitarian minister, minister of his own "Society For Christian Union and Progress" organized in Boston in 1836, editor of his own *Quarterly Review*, and following October 1844, a Catholic, still passionately individualistic and in almost constant controversy with his superiors in the Church. Schlesinger found that the explanatory thread running through Brownson's life was his search for intellectual certainty and logical consistency. Whalen, in this well organized biography, emphasizes more the spiritual quest, beginning when an old lady told the boy that there was but one true church, ending when Brownson entered the Catholic Church.

Perhaps the most puzzling question in connection with the life of Brownson is why such a forceful and well known man was all but forgotten a few years after his death. Whalen holds that the chief reason was that he became a Catholic, and "religious prejudice in the biographers and commentators of his [Brownson's] time" (134), and especially in the "bigot," Theodore Parker, led them to conspire to ignore the man. But this does not adequately explain why Catholics also entirely forgot their most notable convert of the period. What seem more cogent reasons are suggested, but rejected. First, both as Protestant and as Catholic, the forceful and argumentative Brownson, who even shook a long finger under the Emerson nose, was "a genius in making enemies" (129). This would seem to be reason enough for his associates to show a lack of enthusiasm for him. Second, although undoubtedly brilliant, he was so only in flashes. All his gems were buried in piles of rubbish, too deep for literary historians to uncover. Third, changing affiliations so often that he became known as "weathercock Brownson," his writings "were strangely contradictory" (135) and point by point almost cancel out. This has made it difficult for general historians to fit him into any picture of the period. Lastly, and perhaps most important, Brownson, the activist, was forgotten because the movements in which he spent his life were forgotten. So closely was the man identified with the causes he enthusiastically adopted one after another, that following generations that had lost interest in the movements also lost interest in the man. Only as these enthusiasms are understood and recaptured can Brownson be fully appreciated. The present work would be better had the author devoted more space to this task and less to the autobiographical writings of his subject.

At two points especially this lack leads the author to some distortion of perspective and an exaggerated view of Brownson's importance. The first is in connection with the Working Man's Party which Brownson deserted in the midst of the gubernatorial campaign in New York in 1830, helping to throw the election to the Democratic candidate.

Whalen stigmatizes the Party as a "stupendously evil design against labor, education, homes, and the nation" (73) on the part of a small group of free lovers and communists who thought thereby to make themselves "all millionaires within a year after the election" (69). By Brownson's desertion, then, "New York was saved," and "the nation was not exposed to nineteenth-century communism," an obvious distortion. The second instance occurs in the discussion of Brownson's influence as the generating force back of the flowering of New England. Many will question Whalen's conclusion that "the foundation head of Boston's stream of thought came from the mind of Brownson" (126), and will feel dubious of the claim that "many of Emerson's ideas are, to all appearances, rewarmed Brownson paragraphs" (129) because Emerson got many of his ideas from Brownson through their common friend, Thoreau, who in this case played the "over-soul" to the master. On the other hand, Brownson's influence on the New Englanders has no doubt been underestimated. A lamentable slip, also growing out of the same lack of background, is the two page description of Brownson returning from Boston to Auburn on a train in 1829, several years before railroads were built.

The volume has no index or bibliography, which will make it less useful than it might have been.

The University of Chicago.

Sidney E. Mead.

FIFTY YEARS ON THE NEBRASKA FRONTIER

HISTORY OF THE PRESBYTERIAN THEOLOGICAL SEMINARY AT OMAHA

By CHARLES ARTHUR HAWLEY. Omaha: Ralph Printing Company, 1941.
152 pages. \$2.00.

The first fifty years of Omaha Theological Seminary are here recounted authoritatively and with understanding of their significance. Dr. Hawley had first-class access to the sources of information through his work in the institution, and his studies in the history of the region have given him a wide outlook. The story of this seminary is in several ways illustrative of American religious history. It was perhaps the last of the theological seminaries established on the frontier to train ministers for service there. One of the earliest of these was Auburn Seminary. In the expressions of the motives that led to the founding of Auburn in 1818 for "the new settlements" of central and western New York and those that led to the founding of Omaha in 1891 for the Missouri valley there are striking parallels. Between these dates lie many foundations exemplifying the determination of the American churches to assure religious leadership for the expanding nation. Dr. Hawley has described with lifelikeness given by command of documents and letters the vision and gallant labors of the founders of Omaha, typical of many founders.

The annals of Omaha again display an interest in education not sectarian or narrowly clerical. This appears in the close relations of the seminary with Bellevue College and with the University of Omaha in

its first form; of this the modern municipal university is the direct descendant. All three of these institutions expressed the educational ambition of the Presbyterian Church. They continued a concern for education which had been shown by the Presbyterian pioneers in Nebraska in the establishment of a school at Bellevue in 1848, "which they fondly hoped would soon become a college and a theological seminary." These beginnings and later Presbyterian endeavors to meet the needs in schooling of the frontier Dr. Hawley describes in convincing detail. This whole part of his book illustrates for one church and one region what the American churches purposed for the west—broad educational foundations.

A good deal of Dr. Hawley's book consists of the records of a brave struggle to maintain the seminary in the face of insufficient money. The professors unselfishly taught on little salaries. Persistent efforts were made in west and east to secure support. This part of Omaha's history is representative of a phenomenon which has not been accounted for or much regarded, the decline of interest in ministerial training on the part of American Protestants appearing in the late nineteenth century. This interest had been strong before the Civil War. But by the time Omaha arrived the decline had set in, and it continued. Somebody ought to explain this general condition in the American Protestant churches, their loss of concern for the training of their ministry. There are signs of improvement, but the condition lasted long enough to be significant.

Dr. Hawley quotes from a recent impartial survey a statement of the results of nearly fifty years, from which it appears that the institution has done what its founders hoped for. Of about four hundred alumni "the majority have taken small churches in this territory. A great number of these churches have grown into large and prosperous ones." The author's accounts of personalities add appeal and value to the book. Among these the most impressive to the reader is Matthew B. Lowrie, professor in the New Testament for twenty-one years and first president, evidently a man of singular ability and loftiness of character.

Auburn Theological Seminary,
New York City.

Robert Hastings Nichols.



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